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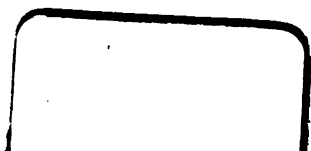
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**A TREATISE**  
**ON THE**  
**LAW OF BILLS OF EXCHANGE,**  
**PROMISSORY NOTES AND CHECKS.**

**BY**  
**WAYLAND E. BENJAMIN, A. M.,**  
**OF THE NEW YORK BAR.**

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**ADAPTED FROM THE ENGLISH WORK OF**  
**HIS HONOR JUDGE CHALMERS.**

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**SECOND AMERICAN EDITION.**

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**CHICAGO:**  
**CALLAGHAN & COMPANY,**  
**1889.**

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## PREFACE TO THE FIRST AMERICAN EDITION.

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WITH the English work before him, the editor has endeavored, as desired by the publishers, "to rewrite the book as Chalmers would have written it had he been an American." Accordingly, while in other particulars carrying out the plan of the author (see Introduction), the Articles, Explanations, etc., are statements of the law of America—the weight of authority where the States are in conflict, indicating authorities directly opposed by a citation of cases *contra*, while the important modifications or limitations of the prevailing rule of law, either in England or America, are concisely stated in the notes. The book has thus been thoroughly rewritten, and the work of the editor incorporated with that of the author. This is an innovation which, it is hoped, will meet the approval of the profession. For convenience of reference, each article is numbered the same as in the English publication.

The cases have been selected with a view to the requirements of the student as well as the practicing lawyer. The student will find, as a general rule, that where the citations are numerous, the first case cited contains the clearest and fullest statement of the principle of law which it is cited to support, and for the lawyer has been selected that case from each State which, being the latest exposition of the law, contains the fullest citation of authorities.

Nothing of value to the profession has been omitted while over fifty pages of new matter have been added to the text, and the result of much labor and thought is now submitted to the profession, trusting that the difficulty of codifying the law of America on this or any other subject, will be duly appreciated.

W. E. B.

ST. PAUL, Minn., May, 1881.

## PREFACE TO THE SECOND AMERICAN EDITION.

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SINCE the publication of the first American edition of Chalmers' Digest, the "Act to codify the law relating to Bills of Exchange, Checks and Promissory Notes" (45 and 46 Vict. c. 61) has been passed. This Act, as implied by its title, is, in the main, merely declaratory, the propositions of the Act having been taken word for word, in most cases, from the propositions of the Digest. This Act is, as yet, the only enactment codifying any branch of the common law upon the English statute book. The last edition (1886) of the Digest consists of the Bills of Exchange Act with notes by Judge Chalmers.

In the present edition I have carefully revised the text of the former in the light of the later English and American decisions. While this required an examination of a large number of cases, but comparatively few of them are cited, as I found but little change in the rules of law and deemed it inconsistent with the plan of the work to enumerate it with a mass of citations to the same point.

I have adhered closely to the method of treatment followed by Judge Chalmers, whose Digest I found in my experience as a teacher specially adapted for use in the classroom; and in the preparation of this edition, I have kept constantly in mind the continued use of the work as the text-book for class instruction in many of our law schools,

and have added such illustrations and cases as seemed most instructive to the student. At the same time I believe the practitioner who desires a ready clue to points and authorities on the law peculiar to commercial paper, will find the field fully covered by this little volume.

I have taken a liberty with the title in this edition which I believe is justified by the fact that the term "Digest," as generally used in this country, does not properly describe a treatise like the present; and because this is in no way a reprint of an English law book annotated with American cases, but more nearly a new work which aims to state the law as established by our courts upon the plan adopted by Judge Chalmers, to whom the larger share of credit is due for the special value of the present work.

W. E. B.

NEW YORK CITY, February, 1889.

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## INTRODUCTION.

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[TO FIRST EDITION OF CHALMER'S DIGEST.<sup>1</sup>]

As far as form goes, the present Digest is modeled on the Indian Codes, the main idea of which is as follows. A general proposition is first laid down. Qualifications or less obvious deductions, when of sufficient importance, are next stated in the form of Explanations. Then come the Exceptions, if any. These abstract propositions are illustrated, when necessary, by examples showing their application to particular states of fact. Each general proposition, with its accompanying "explanations" and "exceptions," forms a separate article. The same plan has been adopted by Sir James Stephen, in his Digests of the Law of Evidence and of the Criminal Law, and by Mr. F. Pollock, in his Digest of the Law of Partnership. As regards the subject of codification generally, and its prospects in this country, I have little or nothing to say. Any reader interested in the matter, will find it fully discussed by the above mentioned authors in the Introductions to the works referred to. Sir James Stephen most certainly cannot be open to the charge of being a mere theorist. He has codified for India, with admirable success, both the Law of Contract and the Law of Evidence, and has shown that in competent hands like his, codification is not an unpractical dream, but a working and highly beneficial reality. These writers have also pointed out that Digests in the present form may be to some extent helpful in preparing the way for codification at home. In the meantime, I hope the form adopted may

<sup>1</sup> Matter in brackets is from the Introduction to the third edition.

be found convenient for a text-book. As regards details of plan I must offer a few words of explanation.

For the most part, provisions applicable to Bills of Exchange are equally applicable to Promissory Notes and Checks; therefore the term "Bill" is used in the articles of this Digest as meaning and including Promissory Note and Check, as well as Bill of Exchange. When a provision does not apply equally to Notes and Checks the full expression "Bill of Exchange" is used, and the distinction is pointed out in a note. The provisions peculiar to Promissory Notes and Checks are collected in two chapters at the end of the book. This plan has been adopted, first, in order to economize space, and secondly in order to give a clearer and more consecutive account of a Bill of Exchange, which is the typical and most important negotiable instrument. As to the second reason, I would refer to the remarks of Mr. Justice Story, in the preface to his work on Bills of Exchange. Subject to the explanation given above, I hope this extensive meaning given to the word "Bill" is justified, and will not lead to confusion. There is to some extent authority for the course pursued. In the Stamp Act, 1870, "Bill of Exchange" is defined so as to include Check, and in the reported cases on checks the instrument is frequently termed a "Bill," as indeed for most purposes it is. In the older cases on promissory notes the instrument is called indifferently a Bill or Note.

To save space letters are substituted for names in the Illustrations, and to facilitate reference and comparison the same letter is always used to denote the same party to a Bill or Note. Thus A. is always used for the drawer of a bill; B. for the drawee or acceptor of a bill or the maker of a note; C. for the payee and first indorser of a bill or note. When a case is quoted, the date is given. This avoids the necessity of referring to more than one report; and where cases are in conflict, it enables the reader to see at a glance which is the most recent and therefore the most authoritative. Where a case directly decides the point it is quoted

to establish, the name is given simply; but when it only decides the point by implication or is relied on as an analogy, or when it merely contains an obiter dictum on the subject, the name is preceded by the mark *cf.* (compare).

Anything like a detailed discussion of doubtful cases, or a history of past controversy on points which may now be considered as settled, would be foreign to the purpose of a work like this; but I have added to the ordinary Index of Cases a list of the more important cases which have been overruled, doubted or explained nominatim, see p. xlix. The list has no pretension to completeness, but perhaps it may be useful as far as it goes. Several of the articles go beyond the logical limits of a digest of a special subject, inasmuch as they state propositions which apply not only to bills, but to all simple contracts alike. In some few cases of frequent occurrence, this is done in the hope that the book may thus be more useful to men of business, who have not other books of reference at hand. In the majority of cases it is done because doubts have arisen as to whether bills were or were not governed by the ordinary rules. In a Code all such articles would be superseded by a single proposition to the effect that when the contrary is not expressed the ordinary rules of law applicable to simple contracts apply to bills. In an unauthoritative Digest, such a proposition seems merely nugatory.

It is almost needless to point out, that the similarity between Indian Codes and a Digest like the present is merely resemblance in form. There all analogy ends. In a Code the subject in hand is treated completely and finally. A Code states methodically the law as the legislature is of opinion that it ought to be. This Digest is an attempt to state methodically the law as it is. In a Code, propositions and illustrations are alike authoritative. In this Digest, the illustrations taken from decided cases are alone authoritative. The general propositions are only entitled to weight in so far as they are complete and legitimate inductions from decided cases which are unquestioned law. A

general proposition, supported by reference to cases, merely amounts to a verifiable hypothesis as to what the law is. In the theory of English law, there exists *in nubibus* a complete set of principles applicable to every conceivable state of facts that can arise. Theoretically the judges do not make law; they only interpret it. They are merely the conductors by which the principle is brought down from the clouds and made available to men. Practically, however, their functions are frequently and of necessity legislative. If a wide subject be investigated systematically, four states of the law will be found to exist. First, the law on a given point may be reasonably certain. All authority, or the great weight of authority, may be in favor of a given proposition. Secondly, a proposition on a given point can only be stated as probably holding good. For instance, it may rest merely on unchallenged obiter dicta, or there may be a decision in favor of it, and weighty obiter dicta opposed to it. Thirdly, the law on a given point may be uncertain. Decisions may be in direct conflict, or again there may be a decision in point which has never been directly questioned, but the ratio decidendi of which seems entirely opposed to the principle of later cases. Fourthly, there may be an entire absence of authority on a given question. Such being the state of the materials available for forming a Digest, it is clear that if the subject is to be treated methodically, many propositions can only be stated tentatively. Many of the articles, therefore, are qualified with a (probably) or a (perhaps), and the reason of the qualification is then stated in a note.

On doubtful points frequent reference is made to American cases and Continental Codes and writers. In mercantile matters, when the law is uncertain or authority wanting, there is an increasing tendency to refer to Foreign Codes and laws in order to see how other nations have solved the difficulty. This is especially the case as regards negotiable instruments, the most cosmopolitan of all contracts. Mr. Justice Story, in his judgment in *Swift v.*

*Tyson* (16 Peters, 1), gives forcible expression to the principle. He says, "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* (2 Burr. 887), to be in a great measure, not the law of a single country only, but of the commercial world. Non erit lex alia Romæ, alia Athenis, alia nunc alia post hac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit."

[Lord Blackburn, in a Scotch appeal concerning a check, lays down a similar rule. "There are," he says, "in some cases differences and peculiarities which, by the municipal law of each country, are grafted on it, but the general rules of the law merchant are the same in all countries. \* \* \* We constantly, in the English courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases when they happen to be in point, and so in a Scotch case, you would cite English decisions, and cite Pothier or any foreign jurist, provided they bore upon the point."']

An American decision, it is needless to say, is not a binding authority in this country, but, if well reasoned, it is always considered with respect by our courts.<sup>1</sup> Many of the American judgments are very valuable as expounding and testing the principles of English decisions. An English case there, like an American case here, is only an authority in so far as it appears to be a correct deduction from the general principles of common law and the law merchant which prevail in both countries alike.

When the subject matter of an article of this Digest is dealt with by the French "Code de Commerce," or the "German General Exchange Law, 1849," their respective provisions are compared. If they agree, a mere reference to the corresponding sections is given. If they differ, the points of difference are given in a note. A vast number of the bills circulated in England are foreign bills. It seems

<sup>1</sup> *McLean v. Clydesdale Bank* (1883), 9 App. Cas. at p. 105.]

<sup>2</sup> See per Cockburn, C. J., in *Saramanga v. Stamp* (1880), 5 C. P. D. at p. 303. C. A.]



useful, therefore, to indicate the main point of divergence which may give rise to a conflict of laws. The French Code is essentially important, as it forms the basis of most of the continental Codes.

[For instance, the Belgian Code, of 1872, enacts for Belgium the provisions of the French Code regarding bills and notes, with a few modifications and the addition of three or four articles which embody the result of French judicial decisions on the construction of the Code. Egypt, Greece and Turkey have, I believe, adopted the provisions of the French Code in their entirety. The Spanish Code of 1830, and the Portuguese Code of 1833, are mainly founded on the French Code de Commerce. Until 1883 the Italian Commercial Code was closely modeled on the French, but the new Italian Code, which came into force in 1883, has departed from the French model as regards bills and notes, and has substantially adopted the provisions of the German Exchange Law.]

French law is worthy of attention in another respect. In the absence of English authority, our Courts have, in some instances, consciously taken it as their guide. (See per Parke, B., in *Foster v. Dawber*, 6 Exch. 852.) The "Code de Commerce," to a great extent, embodies and enacts the opinions of Pothier, whose authority, says Best, C. J. (in *Cox v. Troy*, 5 B. & Ald. 481), "is as high as can be had next to the decision of a Court of Justice in this country." On doubtful points not dealt with by the Code, reference is occasionally made to Pothier, and also to the exhaustive treatise of M. Nouguiet (*Des Lettres de Change and Des Effets de Commerce*, 4th ed., 1875), which gives the latest results of French law.

The German General Exchange Law of 1849 (slightly modified 1869), is important in two respects. First, it is the most elaborate and carefully worked out of the Foreign Codes. Secondly, it is an international and not merely a national Code. All the German states, including Austria, have adopted it, and the terms of its adoption are these;

Each state is at liberty to supplement it by additional laws of its own, but such laws are not in any way to contradict or override it. M. Nonguier, in the work above referred to, gives in French the text of the Exchange Law, and also the various supplementary laws passed by the different states.

It would probably be very advantageous to the commercial world if this principle of an international Code could be further extended. The difficulties in carrying it out do not seem insuperable, though, doubtless, they would be great. The provisions of such Code would have to be settled by agreement, and then each state would enact it for its own territory. In the case of England, it would probably be necessary to confine its operation to foreign bills, that is to say, to bills drawn or payable abroad. Our law as regards foreign bills, does not widely diverge from the laws of other commercial countries, and it diverges chiefly by allowing greater latitude than is adopted in practice.

[Occasional reference also is made to the Indian Code (Act XXVI, of 1881, as amended by Act II, of 1885), which in substance reproduces the English Law as it stood in 1881.]

In a work like the present, it is thought it would be waste of space to carry references to foreign laws or authorities any further, but it may be worth while to mention where they can be found.

Borchardt (*Vollständige Sammlung der geltenden Wechsel und Handels Gesetze aller Länder*, 1871), collects the statutory enactments of all countries relating to Bills of Exchange. Part I gives a German translation, Part II the original text. More than forty countries have codified their law on this subject; in fact, England and the United States seem to be the only civilized nations which have not done so.<sup>1</sup> Since Borchardt's work was published the Egyptian Commercial Code has, I believe, been re-cast. I do not know how far the provisions relating to bills have been altered. M. Nonguier in a supplementary chapter to his work on Bills (*Des Lettres de Change*, 1875), compares the

[<sup>1</sup> Codified now in England; and a bill to codify the law of commercial paper is now pending in Congress.—Ed.]

flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavors to stamp it out. A comparison of some of the main points of divergence between English and French law will show how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise, see the definition of bill in Comyn's Digest).<sup>1</sup> In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a Bill of Exchange necessarily presupposes a contract of exchange.<sup>2</sup> In England (since 1765) a bill may be drawn payable to bearer [though formerly it was otherwise].<sup>3</sup> In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when indorsed in blank. In France an indorsement in blank merely operates as a procuration. An indorsement, to operate as a negotiation, must be an indorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence

[<sup>1</sup> "A bill of exchange is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person, in another country or city, to pay so much to A. or order for value received of B., and subscribes it."]

[<sup>2</sup> This rule is said to be now obsolete, but the Code remains unaltered.]

[<sup>3</sup> See *Stewart v. Hodges* (1692), 12 Mod. 36.]

of the currency theory. In France no cause of action arises unless the bill is again dishonored at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the case of an inland bill, notice of dishonor alone being sufficient. In France every dishonored bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve.

M. D. C.



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- Jones v. Lane (1839), 3 Y. & C. 281, overruled Deuters v. Townsend (1864), 33 L. J. Q. B. at 304.
- Keene v. Beard (1860), 8 C. B. N. S. 372, qualified Hopkinson v. Forster (1874), 19 L. R. Eq. 74.
- Kirk v. Blurton (1841), 9 M. & W. 284, doubted Forbes v. Marshall (1855), 11 Exch. at 180.
- Lambert, *Ex parte* (1794), 13 Ves. 179, overruled *Ex parte* Swan (1868), 6 L. R. Eq. at 358.
- LeFevre v. Lloyd (1814), 5 Taunt. 749, explained Castrique v. Buttigieg (1855), 10 Moore P. C. at 115.
- Lewis v. Reilly (1841), 1 Q. B. 349, discussed "Lindley on Partnership," 3rd ed. p. 423.
- McNair v. Fleming (1812), Mont. on Partnership, 37, doubted Yorkshire Bank v. Beatson (1880), 5 C. P. D. at 114, C. A.
- McNeillage v. Holloway (1818), 1 B. & Ald. 218, qualified Hart v. Stephens (1845), 6 Q. B. at 943.
- Marsh v. Newell (1808), 1 Taunt. 109, explained Deuters v. Townsend (1864), 33 L. J. Q. B. at 304.
- Matthews v. Bloxsome (1864), 33 L. J. Q. B. 209, explained Steele v. M'Kinlay (1880), 5 App. Cas. at 773, H. L.
- Mertens v. Winnington (1794), 1 Esp. 113, doubted *Ex parte* Wyld (1860), 2 DeG. F. & J. at 650.
- Musgrave v. Drake (1843), 5 Q. B. 185, dissented from Hogg v. Skeen (1865), 18 C. B. N. S. at 426; 34 L. J. C. P. at 154.
- Napier v. Schneider (1810), 12 East, 420, dissented from *Re* Gen. South Amer. Co. (1877), 7 L. R. Ch. D. at 644.
- Oulds v. Harrison (1854), 10 Exch. 572, explained *Re* Anglo-Greek Steam Nav. Co. (1869), 4 L. R. Ch. at 177.
- Parry v. Nicholson (1845), 13 M. & W. 778, doubted Hirschmann v. Budd (1873), 8 L. R. Ex. at 172.
- Partridge v. Bank of England (1846), 9 Q. B. 396, qualified Goodwin v. Roberts (1875), 10 L. R. Ex. at 354.
- Phillips v. Astling (1809), 2 Taunt. 206, explained Hitchcock v. Hunfrey (1843), 5 M. & Gr. at 564.

lii TABLE OF CASES OVERRULED, DOUBTED, ETC.

Pike v. Street (1824), M. & M. 226, explained Foster v. Jolly (1835), 1 C. M. & R. at 708.

Randall v. Moon (1852), 21 L. J. C. P. 226, explained Cook v. Lister (1863), 32 L. J. C. P. at 124, 127.

Reg. v. Hawkes (1840), 2 Moore, C. C. 295, overruled Peto v. Reynolds (1854), 9 Exch. at 415.

Reid v. Furnival (1833), 1 Cr. & M. 538, discussed Cook v. Lister (1863), 32 L. J. C. P. at 127.

Rideout v. Bristow (1830), 1 Cr. & J. 231, discussed Nelson v. Serle (1838), 4 M. & W. at 799.

Roberts v. Tucker (1851), 16 Q. B. 560, discussed Woods v. Thiedemann (1862), 1 H. & C. at 495.

Rothschild v. Currie (1841), 1 Q. B. 43, doubted Allen v. Kemble (1848), 6 Moore P. C. at 323, explained and qualified Horne v. Rouquette (1878), 3 L. R. Q. B. D. at 521, 523.

Rowe v. Young (1820), 2 Bligh. H. L. 391; 2 B. & B. 165; overridden by 1 & 2, Geo. IV. c. 78.

Sainsbury v. Parkinson (1860), 18 L. T. N. S. 198, explained Ancona v. Marks (1862), 7 H. & N. at 686; 31 L. J. Ex. at 166.

Scholey v. Welsby (1797), Peake, N. P. C. 34, doubted Phillips v. Warren (1845), 14 M. & W. 380.

Shellard *Ex parte* (1873), L. R. 17 Eq. 109, disapproved Buck v. Robson (1878), 3 Q. B. D. at 689.

Sleigh v. Sleigh (1850), 5 Exch. 514, discussed *Ex parte* Bishop (1880), 15 Ch. D. at 410, 417.

Smith v. Mercer (1815), 6 Taunt. 76, discussed Wilkinson v. Johnson (1824), 3 B. & C. at 437.

Solarte v. Palmer (1834), 1 Bing. N. C. 194, regretted Everard v. Watson (1853), 1 E. & B. at 804; qualified Paul v. Joel (1858), 27 L. J. Ex. at 384.

Strange v. Price (1839), 10 A. & E. 125, overruled Paul v. Joel (1858), 27 L. J. Ex. at 383.

Strong v. Foster (1855), 17 C. B. 201, dissented from Ewin v. Lancaster (1865), 6 B. & S. at 576.

Tindal v. Brown (1786), 1 T. R. 167, overruled Chapman v. Keane (1835), 3 A. & E. at 197.

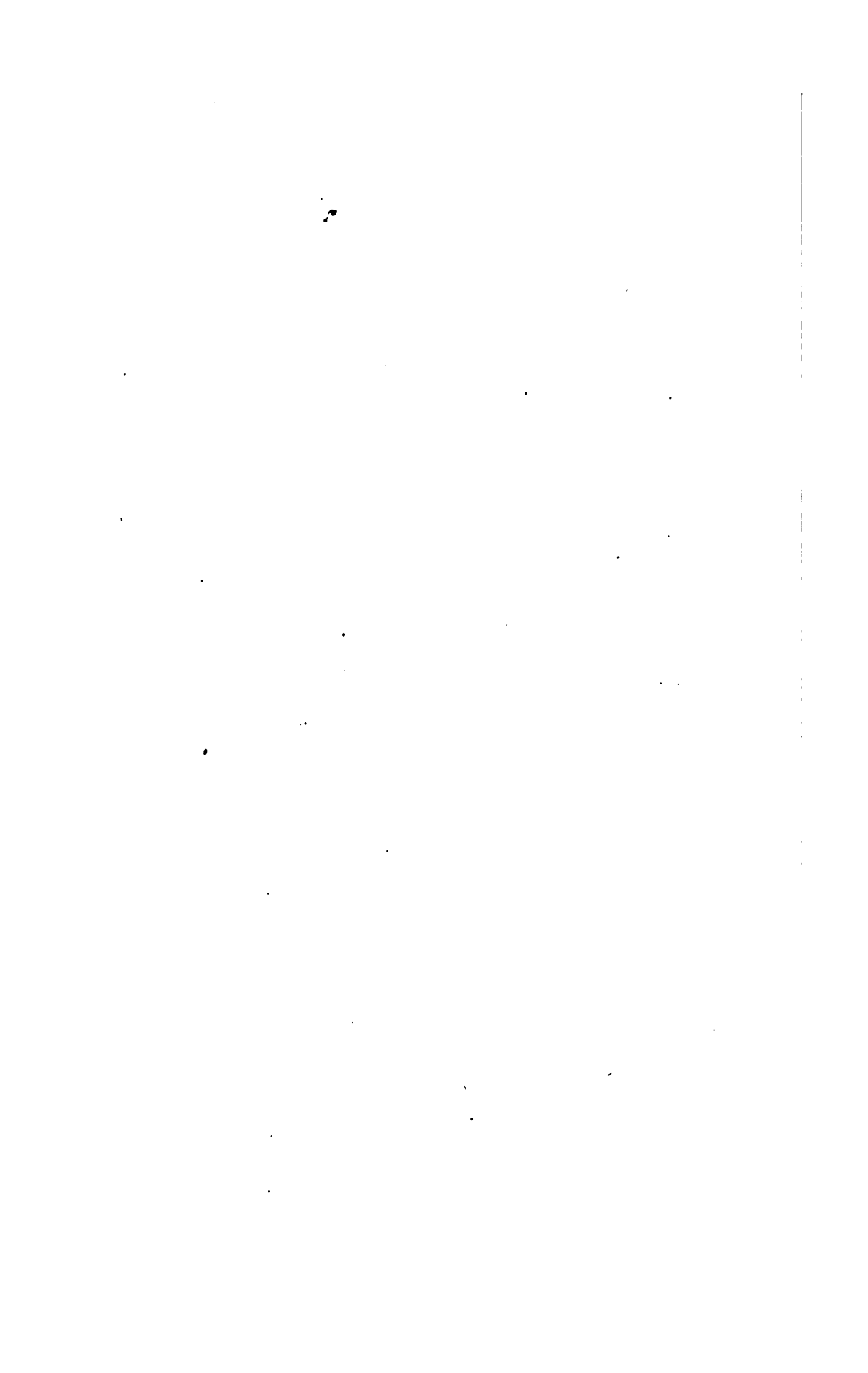
Tinson v. Francis (1807), 1 Camp. 19, dissented from *Ex parte* Swan (1868), 6 L. R. Eq. at 358.

Trimby v. Vignier (1834), 1 Bing. N. C. 151, explained and discussed Bradlaugh v. De Rin (1870) 5 L. R. C. P. 473.

Vanderwall v. Tyrrell (1827), M. & M. 87, explained Geralopulo v. Wieler (1851), 20 L. J. C. P. at 108.

TABLE OF CASES OVERRULED, DOUBTED, ETC. liii

- Walker v. Barnes (1813), 5 Taunt. 240, dissented from *Siggers v. Lewis* (1834), 1 Cr. M. & R. at 370.
- Walwyn v. St. Quentin (1803), 1 B. & P. 652, overruled *Cory v. Scott* (1820), 3 B. & Ald. 622.
- Waring, *Ex parte* (1815), 19 Ves. 345, explained *Vaughan v. Halliday* (1874), 9 L. R. Ch. 561, and *Re Yglesias* (1875), 10 L. R. Ch. 635.
- Woolsey v. Crawford (1810), 2 Camp. 445, dissented from *Re General South American Company* (1877), 7 L. R. Ch. D. at 644.
- Young v. Grote (1827), 4 Bing. 253, discussed *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. at 586; and *Baxendale v. Bennett* (1878), 3 L. R. Q. B. D. at 533.



## LIST OF ABBREVIATIONS.

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Bigelow—Bigelow on Bills. 2d edition. 1880.

Byles—Byles on Bills of Exchange. 13th edition. 1885.

Chitty—Chitty on Bills of Exchange. 11th edition. 1878.

British Code—Bills of Exchange Act. 1882. (45 and 46  
Vict. c. 61.)

Daniel—Daniel on Negotiable Instruments. New York. 3d  
edition. 1882.

French Code—French Code de Commerce of 1818.

German Exchange Law—German General Exchange Law of  
1849.

Indian Code—Indian Negotiable Instruments Act. 1881.

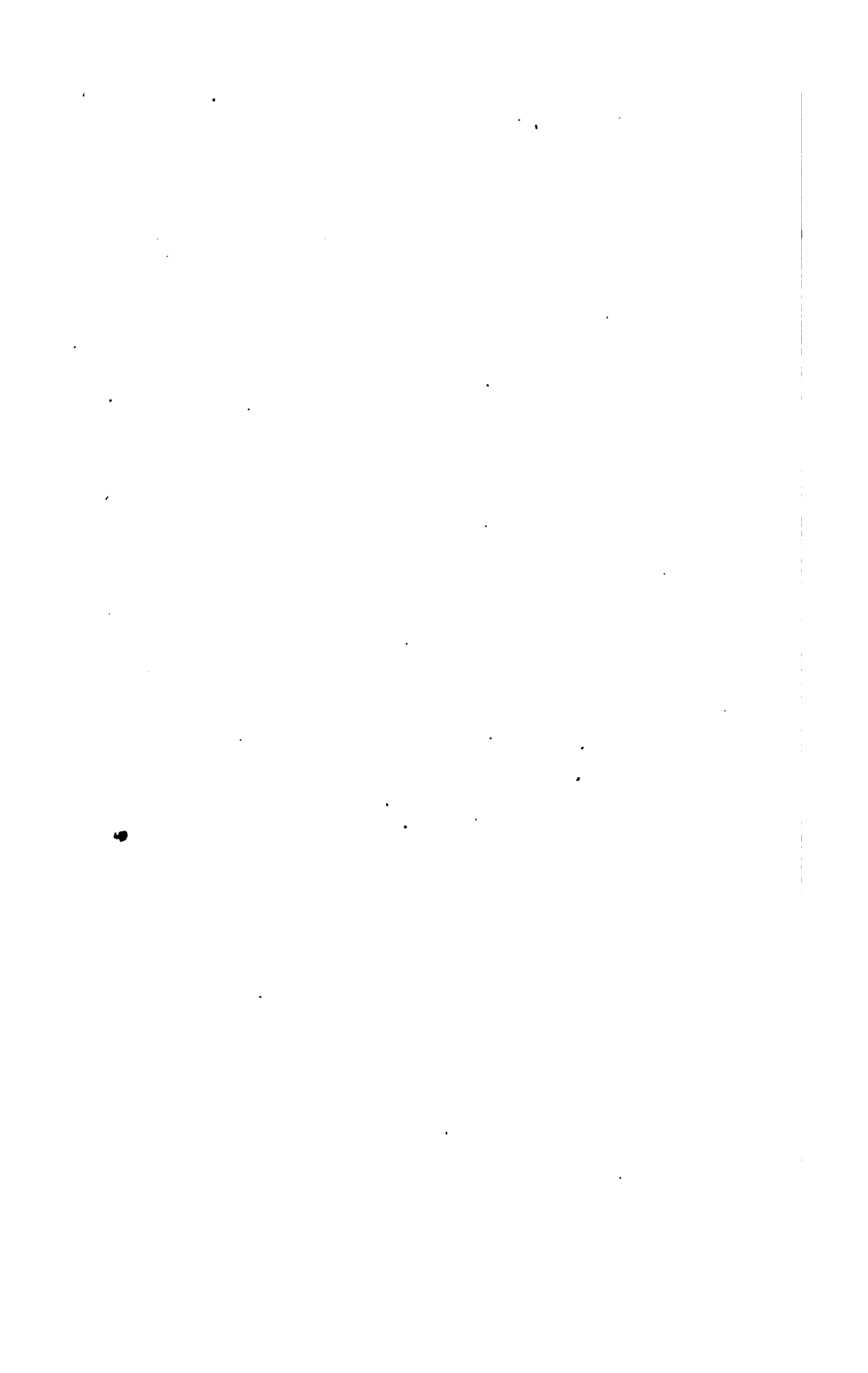
Lindley—Lindley on Partnership. 3d edition.

Nouguier—Nouguier's "Lettres de Change et Effets de Com-  
merce." Paris. 4th edition. 1875.

Pothier—Pothier, Traité du Contrat de Change. Paris. 1847.

Story—Story's Commentary on the Law of Bills of Exchange.  
4th edition. 1860.





# A TREATISE

ON THE LAW OF

## BILLS OF EXCHANGE, PROMISSORY NOTES AND CHECKS.

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### CHAPTER I.

#### FORM AND INTERPRETATION OF BILLS.

[EXPLANATORY HEAD NOTE. — The term "Bill," as used in the articles of this Treatise, includes, *mutatis mutandis*, Promissory Note and Check as well as Bill of Exchange. When a provision does not apply equally to Notes and Checks, the full expression "Bill of Exchange" is used. See Introd. p. x, and head note to Chaps. IX and X.]

Art. 1. A Bill of Exchange is an unconditional order in writing for the payment of a sum of money, absolutely and at all events.

Bill of  
Exchange  
defined.

NOTE.—A Bill of Exchange is frequently called a "Draft." No particular form of words is requisite to its validity (Art. 10), and it need not necessarily be negotiable (Art. 8); therefore negotiability, its chief characteristic, does not enter into the definition. By German Exchange Law, Art. 4, a bill must expressly mention that it is a Bill of Exchange. Subjoined are two common forms:

#### FORM 1.—INLAND BILL.

No. 10. \$100.

Chicago, Ill., January 1st, 1870.

Three months after date pay to our order the sum of one hundred dollars.

Value received.

ANDREWS & Co.

To Messrs. Brown & Sons, Chicago, Ill.

Bill of  
Exchange  
defined.

FORM 2.—FOREIGN BILL.

No. 10. Exchange for £100.

Calcutta, 1st January, 1870.

Six months after sight of this First of Exchange (Second and Third unpaid), pay to the order of Mr. John Charles, one hundred pounds.

Value received, and charge the same to account of Messrs. Smith & Co., against your letter of credit, No. 1.

JAMES ANDREWS.

To Mr. J. Brown, London.

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*Parties.*

Necessary parties.

Art. 2. There must, in point of form, be three parties to a Bill of Exchange in its origin, and two at least of these must be different persons. They are—

- (1.) The party who gives the order, called the drawer.
- (2.) The party on whom the order is given, called the drawee. If the drawee duly signify his assent thereto, he is called the acceptor, and becomes the principal debtor on the bill.
- (3.) The party in whose favor the order is given, called the payee.

*Explanation 1.*—The drawer and payee may be the same person, *i. e.*, a bill may be drawn payable to the drawer, or his order.<sup>1</sup>

*Explanation 2.*—A bill may be payable to the order of the drawee, if he act in two different capacities.<sup>2</sup>

ILLUSTRATION.

B. is in business on his own account. He is also agent for X. A bill is drawn on B. as agent for X., payable to his order on his own account. He accepts and indorses it. This is a valid bill.

<sup>1</sup> *Buller v. Cripps* (1704), 1 Salk. 130; *Miller v. Weeks* (1853), 22 Pa. St. 89; German Exchange Law, Art. 6.

<sup>2</sup> *Holdsworth v. Hunter* (1830), 10 B. & C. 449; *Witte v. Williams* (1876), 8 So. Car. 290; S. C. 28 Am. R. 29.<sup>9</sup>

NOTE.—It is clear that the instrument is not a bill, which <sup>Necessary</sup> can not be enforced until it is indorsed away: Cf. *R. v. Bartlett* (1841), 2 M. & R. 362. Hence, if a person draw a bill on himself payable to his own order, it is a nullity until transferred.<sup>1</sup>

*Explanation 3.*—If the drawer and drawee be the same person, or if the drawee be a fictitious person, the holder may treat the instrument, at his option, either as an accepted Bill of Exchange or as a note.<sup>2</sup>

#### ILLUSTRATIONS.

1. A. & Co. carry on business in London and Liverpool. The London house draw a bill on the Liverpool house. The holder may treat it as a note made by the London house payable in Liverpool; and if it be not paid, the omission to give notice of dishonor to the London house is immaterial.<sup>3</sup>

2. A. draws a bill on B. and negotiates it to C.; B. is a fictitious person. C. may treat the bill as a note made by A. He need not prove presentment or give notice of dishonor.<sup>4</sup>

3. The directors of a joint stock company draw a bill in the name of the company, addressed "To the Cashier." The holder may treat it as a note by the company.<sup>5</sup>

4. A. draws on his agent in favor of C. C. may treat the instrument as the note of the principal.<sup>6</sup>

NOTE.—Cf. Art. 139. Fictitious payee or indorser. As to notes, see Arts. 272, 274 and 286, note.

Art. 3. "Holder" means the person in possession <sup>Holder</sup> of a bill, who by the Law Merchant is entitled to enforce the payment thereof. It includes equally payee, indorsee, or bearer.

<sup>1</sup>*Randolph v. Parish* (1839), 9 Port. (Ala.) 76; *Commonwealth v. Buttrick* (1868), 100 Mass. 12.

<sup>2</sup>*Miller v. Thomson* (1841), 3 M. & Gr. 576; *Fairchild v. R'y Co.* (1857), 15 N. Y. 337; *Taylor v. Newman* (1883), 77 Mo. 257; Cf. German Exchange Law, Art. 6.

<sup>3</sup>*Id.*; Cf. *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. 133, P. C.

<sup>4</sup>*Smith v. Bellamy* (1817), 2 Stark. 223.

<sup>5</sup>*Allen v. Sea Assurance Co.* (1850), 9 C. B. 574; *Chicago R. R. Co. v. West* (1871), 37 Ind. at 216; *Hasey v. White P. B. S. Co.* (1843), 1 Doug. (Mich.) 193.

<sup>6</sup>*Wardens v. Moore* (1843), 1 Ind. 289; *Hardy v. Pilcher* (1879), 57 Miss. 18; *McCormick v. Hickey* (1887), 24 Mo. App. 362.

Holder.

NOTE.—Cf. Art. 125. Holder and *de facto* holder distinguished.

Signature of drawer.

Art. 4. A Bill of Exchange must be signed by the drawer.<sup>1</sup> Cf. Art. 49.

*Explanation.*—The drawer's signature may be added at any time, but until it is there the instrument is inchoate and without effect (Art. 23).

## ILLUSTRATION.

A. draws a bill on B., payable to drawer's order, but does not sign it. B. accepts, and it is transferred for value to C. The instrument is neither a bill nor a note.<sup>2</sup>

NOTE.—If a bill payable to the drawer's order were indorsed by the drawer, though not signed by him on the face, this would probably be sufficient. It is so in France: *Nouguier*, § 199; Cf. Art. 32.

Designation of drawee.

Art. 5. The drawee must be designated in a Bill of Exchange with reasonable certainty.<sup>3</sup>

## ILLUSTRATIONS.

1. Instrument in the form of a bill, but addressed "To —, Mobile, Ala." This is not a bill.<sup>4</sup>

2. Instrument in the form of a bill payable to drawer's order, not containing the name of the drawee, but expressed to be payable "at No. 1 X. Street, London." B., who lives there, accepts it. This is a bill, and B. is liable as acceptor.<sup>5</sup>

3. Instrument in the form of a bill. Where the address to the drawee should be, are the words "at Messrs. B. & Co." This is a bill addressed to B. & Co.<sup>6</sup>

<sup>1</sup> *Tevis v. Young* (1858), 1 Metc. (Ky.) 199; Cf. *Ex parte Hayward* (1871), 6 L. R. Ch. 546; German Exchange Law, Art. 4; *Nouguier*, §§ 87, 88.

<sup>2</sup> *Id.*; *McCall v. Taylor* (1865), 34 L. J. C. P. 265; Cf. *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94; *Hogarth v. Latham* (1878), 3 L. R. Q. B. D. 643.

<sup>3</sup> Cf. *Peto v. Reynolds* (1854), 9 Exch. 410; 11 Exch. 418; Ex. Ch.; *Almy v. Winslow* (1879), 126 Mass. 342; French Code, Art. 110; German Exchange Law, Art. 4.

<sup>4</sup> *Watrous v. Holbrook* (1873), 39 Tex. 572; *Peto v. Reynolds*, *supra*; *Petillon v. Lorden* (1877), 86 Ill. 361; Cf. also, Arts. 37, 58.

<sup>5</sup> *Gray v. Milner* (1818), 8 Taunt. 739.

<sup>6</sup> *Shuttleworth v. Stephens* (1808), 1 Camp. 407.

4. Instrument in the form of a bill addressed "To Str. X. and owners," is accepted by the agent of the owner, B. B. is liable as acceptor.<sup>1</sup> Designation of drawee.

NOTE.—Speaking of the indication of the drawee, Mr. Justice Story says: "This seems indispensable to the rights, duties and obligations of all the parties, for the payee cannot otherwise know upon whom he is to call to accept and pay the bill; nor can any other person know whether it is addressed to him or not, or whether he would be justified in accepting and paying the bill on account of the drawer." *Story on Bills*, § 58. The question in *Illustr. 2* has arisen also in Scotland and France, and has been decided in the same way: *Thompson*, p. 46; *Nouguier*, § 131. A check in this form would probably be invalid, for the uncertainty could not be cured by acceptance: Cf. Art. 2 as to a Fictitious Drawee.

Art. 6. A Bill of Exchange may be addressed to two or more drawees, jointly, whether partners or not.<sup>2</sup> Several drawees.

NOTE.—In *Anon.* (1701), 12 Mod. 446, a bill addressed to "B., or in his absence to X.," was accepted by B., and was held good. But, as far as appears, X. may have been an ordinary case of need. An alternative drawee seems to make the payor uncertain: Cf. *Ferris v. Bond* (1821), 4 B. & Ald. 679, holding a note payable in the alternative by one of two makers, invalid.<sup>3</sup> The British Code § 6 (2), now provides that a bill addressed to two drawees in the alternative or to two or more drawees in succession, is not a bill of exchange.

Art. 7. A Bill of Exchange may designate one or more persons in addition to the drawee, to be resorted to for acceptance or payment in case of need, *i. e.*, in the event of the bill being dishonored by the drawee.<sup>4</sup> Case of need

NOTE.—Such person is called the drawee or referee in case of need, or simply the case of need. The practice of designating a case of need is not common in America. According to French law the case of need (*besoin* or *recommandataire*) must reside where the bill is payable (*Nouguier*, § 244; and cf. German Exchange Law, Art. 56); but this is not the case

<sup>1</sup> *Alabama C. M. Co. v. Brainard* (1860), 35 Ala. 476.

<sup>2</sup> Cf. *Harmer v. Steele* (1849), 4 Exch. at 13. Ex. Ch.

<sup>3</sup> Cf. *Jackson v. Hudson* (1810), 2 Camp. at p. 448: "There cannot be a series of acceptors."

<sup>4</sup> Cf. *Re Leeds Banking Co.* (1865), 1 L. R. Eq. 1, and 6 & 7 Will. 4, c. 68; French Code, Art. 173; German Exchange Law, Art. 62.

**Case of need.** in England: see the language of 6 & 7 Will. 4, c. 58. A bill on Liverpool often names a case of need in London: Cf. Art. 122. Indorser may name case of need. Art. 184: Presentment to case of need.

**To whom payable.**

Art. 8. A bill may be expressed to be payable to a person therein designated, or to his order, or to bearer.<sup>1</sup>

#### ILLUSTRATIONS.

1. Pay C.—Pay the trustees of the X. Chapel.—Pay to bearer C.<sup>2</sup>

2. Pay C. or order—Pay to the order of C.

3. Pay to bearer.—Pay to ship "Fortune," or bearer.<sup>3</sup>

Pay — or bearer.<sup>4</sup> Pay to bills payable or order.<sup>5</sup> Pay to order.<sup>6</sup>

*Explanation 1.*—A bill drawn payable to a particular person simply, without the addition of the words "or order," "or bearer," or their equivalents, is valid *inter partes*, but not negotiable.<sup>7</sup>

**NOTE.**—In Connecticut a non-negotiable bill does not import a consideration unless expressed to be "for value received."<sup>8</sup> By French Code, Art. 110, a bill must be payable to order. A bill payable to bearer or to a particular person simply would be invalid. By German Exchange Law, Art 4, the payee must be named. In Scotland, a bill is negotiable unless words prohibiting negotiation are used, *e.g.*, "Pay C. only;" *Robertson v. Burdekin* (1843), 1 Ross L. C. 824. British Code, §, 8 (4) has adopted the Scotch rule. German Exchange Law, Art. 9, is to the same effect.

*Explanation 2.*—A bill drawn payable to the order of a particular person is payable to him or his order.<sup>9</sup>

<sup>1</sup> Cf. *Storm v. Stirling* (1854), 2 E. & B. at 842.

<sup>2</sup> *Warren v. Scott* (1871), 32 Ia. 22.

<sup>3</sup> *Grant v. Vaughan* (1764), 3 Burr. 1516; *Ellis v. Wheeler* (1825), 8 Pick. (Mass.) 18.

<sup>4</sup> Cf. *Haussoullier v. Hartsinck* (1798), 7 T. R. 733.

<sup>5</sup> *Mechanics' Bank v. Straiton* (1867), 3 Abbott's N. Y. Ap. 269.

<sup>6</sup> *Davega v. Moore* (1826), 3 McCord L. (S. C.) 482.

<sup>7</sup> *Plimley v. Westly* (1835), 2 Bing. N. C. at 251; *Wells v. Brigham* (1850) 6 Cush. (Mass.) 6; *Corbett v. Clark* (1878), 45 Wis. 403.

<sup>8</sup> *Bristol v. Warner* (1848), 19 Conn. 7.

<sup>9</sup> *Smith v. McClure* (1804), 5 East. 476; Cf. *Harvey v. Cane* (1876), 84 L. T. N. S. 64.

## ILLUSTRATION.

To whom  
payable.

Bill drawn thus, "Pay to the order of C." C. can enforce payment to himself without indorsing it.<sup>1</sup>

NOTE.—But a bill payable "to bearer C." is not payable to C. or bearer. It is not negotiable.<sup>2</sup>

Art. 9. The payee of a bill, not payable to bearer, must be an existing person capable of being ascertained and identified at the time it is issued.<sup>3</sup>

Payee must  
be person  
in case.

*Explanation 1.*—Extrinsic evidence is admissible to identify the payee when misnamed, or when designated by description only, but not to explain away an uncertainty patent on the bill.<sup>4</sup>

## ILLUSTRATIONS.

The following are valid:

1. Pay to C., D. and E., or the order of any two of them.<sup>5</sup>
2. Pay C. or his agent.—Pay the trustees of the X. Society, or their treasurer for the time being.—Pay C. or his wife.<sup>6</sup>
3. Pay to C., the treasurer for the time being of the X. Company.<sup>7</sup>
4. "Pay on demand to the cashier of the X. Bank." Evidence is admissible to show that C. was cashier of the X. Bank when the bill was issued.<sup>8</sup>
5. "Pay to the administrator of X., deceased." Evidence is admissible to show that C. was administrator of X. when the bill was issued."<sup>9</sup>

<sup>1</sup> *Smith v. McClure* (1804), 5 East, 476; *Durgin v. Bartol* (1874), 64 Me. 473.

<sup>2</sup> *Warren v. Scott* (1871), 32 Ia. 22.

<sup>3</sup> *Cowie v. Sterling* (1856), 6 E. & B. 333, Ex. Ch.; *Adams v. King* (1854), 16 Ill. 169.

<sup>4</sup> *Soares v. Glyn* (1845) 8 Q. B. 24, Ex. Ch.; *Musselman v. Oakes* (1857), 19 Ill. 81.

<sup>5</sup> *Watson v. Evans* (1863), 32 L. J. Ex. 137.

<sup>6</sup> *Holmes v. Jaques* (1866), 1 L. R. Q. B. 376; *Bourdin v. Greenwood*, (1871), 13 L. R. Eq. 281; *Noxon v. Smith* (1879) 127 Mass. 485; *Gaytes v. Hibbard* (1869), 5 Biss. (C. Ct.) 99.

<sup>7</sup> *R. v. Box* (1815), 6 Taunt. 325; *Vater v. Lewis* (1871), 36 Ind. 288.

<sup>8</sup> *Commercial Bank v. French* (1839), 21 Pick. (Mass.) 486; *Soares v. Glyn*, *supra*; *Nave v. First Nat. Bank* (1882), 87 Ind. 204.

<sup>9</sup> *Adams v. King* (1854), 16 Ill. 169.



Payee must  
be person in  
case.

6. "Pay on demand, value received of C.," which in effect is, "Pay to C. on demand."<sup>1</sup>

7. "Pay to J. Smythe." Evidence is admissible to show that T. Smith is the person intended to be described thereby.<sup>2</sup>

8. Pay to "bills payable or order"—"St. Bt. X. and owners"—"I promise to pay you."<sup>3</sup>

The following are invalid:

9. "Pay C. or D.," there being no apparent community of interest.<sup>4</sup>

10. Six months after date, pay to the treasurer for the time being of the C. institution.<sup>5</sup>

11. "Pay — or order." Evidence is inadmissible to show that C. was intended to be the payee.<sup>6</sup>

12. "Pay to the estate of X., deceased."<sup>7</sup>

13. "Pay on demand," stating no payee.<sup>8</sup>

*Explanation 2.*—If the payee of a bill be a fictitious or non-existing person, no title can be made thereto except by estoppel (Art. 139).

*Exception.*—If a bill be made payable to a deceased person in ignorance of his death, his executors or administrators may adopt the transaction.

#### ILLUSTRATION.

A. in England draws a bill on B., payable to C., who is in India. At the time the bill is drawn C. is dead, but the fact is not known to A. C.'s administrator may sue A. on the bill.<sup>9</sup>

<sup>1</sup> *Green v. Davies* (1825), 4 B. & C. 235; *Pothier de Change*, n. 31.

<sup>2</sup> *Willis v. Barrett* (1816), 2 Stark. 29; *Jacobs v. Benson* (1855), 39 Me. 132; *Patterson v. Graves* (1841), 5 Blackt. (Ind.) 593.

<sup>3</sup> *Mechanics' Bank v. Stratton* (1867), 3 Abbott's N. Y. Ap. Dec. 269; *Moore v. Anderson* (1856), 8 Ind. 18; *Kinney v. Flynn* (1852), 2 R. I. 319.

<sup>4</sup> *Blanckenhagen v. Blundell* (1819), 2 B. & Ald. 417; *Carpenter v. Farnsworth* (1871), 106 Mass. 561. But Cf. *Westgate v. Healy* (1857), 4 R. I. 523; *Holmes v. Jaques* (1866), L. R. 1 Q. B. 376; and *Watson v. Evans* (1863), 32 L. J. Ex. 137, where the instruments were upheld. <sup>5</sup> *Cowie v. Sterling* (1856), 6 E. & B. 333, Ex. Ch.; *Yates v. Nash*, (1860), 29 L. J. C. P. 306; Cf. *Illustr. 4, supra*. But Cf. *McBroom v. Corporation* (1869), 31 Ind. 268.

<sup>6</sup> *R. v. Randall* (1811), Russ. & R. 193. See Art. 23.

<sup>7</sup> *Lyons v. Marshall* (1851), 11 Barb. (N. Y.) at 248; *Hendricks v. Thornton* (1871), 45 Ala. at 302.

<sup>8</sup> *Minet v. Gibson* (1791), 1 H. Bl. at 608; *Rich v. Starbuck* (1875), 51 Ind. 87; *Douglass v. Wilkeson* (1831), 6 Wend. 637.

<sup>9</sup> *Murray v. East India Co.* (1821), 5 B. & Ald. 204. But Cf. *Valentine v. Holloman* (1869) 63 N. C. 475.

NOTE.—By statute in New York (3 R. S. 7 Ed. 2241, § 5) <sup>Payee must be person in case.</sup> notes made payable to the order of a fictitious person, if negotiated by the maker, have the same effect, and are of the same validity as against the maker and all persons having knowledge of the facts, as if payable to bearer. The proposed Civil Code of N. Y. (1888), § 2744, provides that “a negotiable instrument made payable to the order of a person obviously fictitious is payable to bearer.”

### *Order to Drawee.*

Art. 10. The order to the drawee may be in any form of words, provided it be an unconditional requisition for the payment of money absolutely and at all events.<sup>1</sup> Order to drawee.

#### ILLUSTRATIONS.

The following are valid, though unusual:

1. “Credit C. or order with \$100 in cash.”<sup>2</sup>
2. “Pay, or cause to be paid, to C. or order, \$100.”<sup>3</sup>

The following are invalid, as being conditional:

3. Pay C. or order \$100, provided the terms mentioned in my letter be complied with.<sup>4</sup>
4. “ “ “ to stand as a set-off for the sum bequeathed to me above the share of X.<sup>5</sup>
5. “ “ “ to be held as collateral security for the payment of the money owed him by X. if he cannot realize the other securities.<sup>6</sup>
6. “ “ “ in consideration that he will abandon the action now pending.<sup>7</sup>

<sup>1</sup> *Durkes v. DeLorane* (1771), 3 Wils. at 213; *Cook v. Satterlee* (1826), 6 Cow. (N. Y.) 108; *Gillilan v. Myers* (1863), 31 Ill. 525.

<sup>2</sup> *Ellison v. Collingridge* (1850), 9 C. B. 570. But Cf. *Woolley v. Sergeant* (1826), 3 Halst. (N. J.) 262.

<sup>3</sup> *Lovell v. Hill* (1838), 6 C. & P. 238.

<sup>4</sup> *Kingston v. Long* (1784), 4 Dougl. 9; Cf. *Boird v. Underwood* (1874), 74 Ill. 176; *Coolidge v. Ruggles* (1819), 15 Mass. 387.

<sup>5</sup> *Clarke v. Percival* (1831), 2 B. & Ad. 660.

<sup>6</sup> *Robins v. May*, (1839), 11 A. & E. 213; *Haskell v. Lambert* (1860), 16 Gray (Mass.) 592.

<sup>7</sup> *Drury v. Macaulay* (1846), 16 M. & W. 146; *Hays v. Gwin* (1862), 19 Ind. 19. *Aliter*, if consideration be executed.

Order to  
drawee.

7. Pay C., or order \$100 not to be demanded in the event of my death.<sup>1</sup>

8. Note payable to order in usual form, but written in the margin, "Given as collateral security with agreement."<sup>2</sup>

The following are valid:

9. Pay C. or order \$100, "as per memorandum of agreement."<sup>3</sup>

10. Pay C. or order \$100, "on return of this receipt."<sup>4</sup>

NOTE.—Cf., Art. 13 and Art. 19. As to construction, Cf. Art. 56. Comparing bills with notes, the order to the drawee when accepted corresponds with the promise by the maker. It is the same contract stated conversely. There is, however, this distinction: A bill may not be drawn conditionally, and a note may not be made conditionally; but a bill may be accepted conditionally; therefore the liability of the principal debtor on a bill may be conditional, while the liability of the principal debtor on a note must be absolute. A bill absolute in form may be delivered conditionally. Art. 55. And a note has been held valid although at the time of making, an indorsement thereon made its payment conditional, on the ground that the indorsement was no part of the note.<sup>5</sup> If payment is conditional, the instrument is not merely non-negotiable; it is *not a bill*, and is not entitled to grace or presumption of consideration.<sup>6</sup>

*Explanation 1.*—The direction must be imperative, not permissive or precative; but the insertion of mere terms of courtesy will not make it precative.

#### ILLUSTRATIONS.

1. "Mr. B. will much oblige Mr. A. by paying C. or order."—Valid.<sup>7</sup>

<sup>1</sup> *Richardson v. Martyr* (1855), 25 L. T. Q. B. 64; Cf. *Seacord v. Burling* (1848), 5 Den. (N. Y.) 444.

<sup>2</sup> *Costello v. Crowell* (1879), 127 Mass. 293; Cf. *Fitchburg Sav. Bank v. Rice* (1878), 124 Mass. 72.

<sup>3</sup> *Jury v. Baker* (1858), E. & B. & E. 459; Cf. *Taylor v. Curry* (1871), 109 Mass. 36.

<sup>4</sup> *Frank v. Wessels* (1876), 64 N. Y. 155; *Hunt v. Divine* (1865), 37 Ill. 137; Cf. *Hubbard v. Moseley* (1858), 11 Gray (Mass.) 170, not in conflict.

<sup>5</sup> *Tappan v. Ely* (1836), 15 Wend. (N. Y.) 362.

<sup>6</sup> *Conover v. Stillwell* (1869), 34 N. J. L. 54; *DeForest v. Frary* (1826), 6 Cow. (N. Y.) 151.

<sup>7</sup> *Ruff v. Webb* (1794), 1 Esp. 129, Lord Kenyon.

2. "Please let the bearer have \$100. I will arrange it with you this noon."—Valid.<sup>1</sup> Order to drawee.

3. "Please let bearer have \$100, and you will much oblige me."—Invalid.<sup>2</sup>

4. "We authorize you to pay C. or order."—Invalid.<sup>3</sup>

*Explanation 2.*—An order to pay out of a particular fund does not constitute a bill; but an absolute order to pay, coupled with (1) a direction to the drawee to reimburse himself out of a particular fund,<sup>4</sup> or (2) a statement of the transaction which gave rise to the bill, is valid.

#### ILLUSTRATIONS.

The following orders or promises are invalid :

1. Pay C. or order \$100 out of the money in your hands belonging to the X. Company.<sup>5</sup>
2. " " out of the money due from X. as soon as you receive it.<sup>6</sup>
3. " " out of the money arising from my reversion when sold.<sup>7</sup>
4. " " on the sale or produce when sold of the X. hotel.<sup>8</sup>
5. " " out of the moneys now due, or hereafter to become due, to me under the will of my late father and before making any payment to me thereout.<sup>9</sup>

<sup>1</sup> *Biesenthal v. Williams* (1864), 1 Duv. (Ky.) 329.

<sup>2</sup> *Little v. Slackford* (1828), 1 M. & M. 171.

<sup>3</sup> *Hamilton v. Spottiswoode* (1849), 4 Exch. 200; and Cf. *Russell v. Powell* (1845), 14 M. & W. 418. Each case must be determined on its merits. Test question is—Does the language show an intention to assume the liability of the drawer of a bill?

<sup>4</sup> *Schmittler v. Simon* (1886), 101 N. Y. 554.

<sup>5</sup> *Jenny v. Herle* (1723), 2 Ld. Raym. 1361; Cf. *Turner v. R. R. Co.* (1880), 95 Ill. 184.

<sup>6</sup> *Dawkes v. DeLorane* (1771), 3 Wils. 287; *Mills v. Kuykendall* (1827), 2 Blackf. (Ind.) 47.

<sup>7</sup> *Carlos v. Fancourt* (1794), 5 T. R. 482, Ex. Ch.; Cf. *Worden v. Dodge* (1847), 4 Den. (N. Y.) 159; *Brill v. Hoile* (1881), 53 Wis. 537.

<sup>8</sup> *Hill v. Hallford* (1801), 2 B. & P. 413, Ex. Ch.

<sup>9</sup> *Fisher v. Calcet* (1879), 27 W. R. 301, M. R.

Order to  
drawee.

6. Pay C. or order \$100, and deduct the same from my share of the partnership profits.<sup>1</sup>
7.       "       "       the demand I have against the estate of X., deceased.<sup>2</sup>
8. Bill drawn on a public officer, though in terms absolute.<sup>3</sup>

The following are valid:

8. Pay C. or order \$100, as my quarterly half-pay due 1st February by advance.<sup>4</sup>
9.       "       "       and take the same out of our share of the grain.<sup>5</sup>
10.       "       "       being a portion of a value as under, deposited in security for the payment hereof.<sup>6</sup>
11.       "       "       against cotton, per "Swallow."<sup>7</sup>
12.       "       "       on account of moneys advanced by me for the X. Company.<sup>8</sup>
13.       "       "       against credit No. 20, and place it to account, as advised per X. & Co.<sup>9</sup>

NOTE.—The sufficiency of the fund referred to is immaterial. An order invalid as a bill may be valid as an equitable assignment.<sup>10</sup>

<sup>1</sup> *Munger v. Shannon* (1874), 61 N. Y. 251, (reviewing cases); Cf. *Ehrichs v. DeMill* (1878), 75 N. Y. 370.

<sup>2</sup> *West v. Foreman* (1852), 21 Ala. 400; *Morton v. Naylor* (1841), 1 Hill (N. Y.) 583.

<sup>3</sup> *Reeside v. Knox* (1837), 2 Whart. (Pa.) 233; *East Township v. Ryan* (1878), 86 Pa. St. 459; *Read v. Buffalo* (1877), 67 Barb. 526.

<sup>4</sup> *MacLeod v. Snee* (1728), 2 Stra. 762; Cf. *Wells v. Brigham* (1850), 6 Cush. (Mass.) 6.

<sup>5</sup> *Corbett v. Clark* (1878), 45 Wis. 403; Cf. *Redman v. Adams* (1863), 51 Me. 429.

<sup>6</sup> *Haussoullier v. Hartsinck* (1798), 7 T. R. 733; Cf. *Towne v. Rice* (1877), 122 Mass. 67; *Howry v. Eppinger* (1876), 34 Mich. 29; *Newton W. Co. v. Diers* (1880), 10 Neb. 284; *Mott v. Havana Nat. Bank* (1880), 22 Hun (N. Y.) 354. But see *contra* to last case, *Sloan v. McCarty* (1883), 134 Mass. 245.

<sup>7</sup> Cf. *Inman v. Clare* (1858), Johns. 769.

<sup>8</sup> *Griffin v. Weatherby* (1868), 3 L. R. Q. B. 753.

<sup>9</sup> Cf. *Banner v. Johnston* (1871), 5 L. R. H. L. 157; *Kelley v. Brooklyn* (1843), 4 Hill (N. Y.) 263.

<sup>10</sup> *First Nat. Bank v. Dubuque S.W. R. Co.* (1879), 52 Ia. 378; *Buck v. Robson* (1878), 3 Q. B. D. 686; *Percival v. Dunn* (1885), 29 Ch. D. 128; *Glyn v. Hood* (1860), 1 DeG. F. & J. at 348; *Grant v. Wood* (1858), 12 Gray (Mass.) 220.

*Explanation 3.*—The order must require the pay-  
ment of money.<sup>1</sup> Order to  
drawn.

#### ILLUSTRATIONS.

The following are not bills:

1. An order for the delivery to bearer on demand of a certain quantity of iron.<sup>2</sup>
2. A promise to pay C. or order \$100 in cotton;<sup>3</sup> or in work and labor.<sup>4</sup>
3. A promise to pay in money or property at the maker's option.<sup>5</sup>
4. An order for the payment of accrued rent, though the rent is payable in money.<sup>6</sup>
5. Pay C. or order \$100 "in good East India bonds."<sup>7</sup>
6. An instrument promising to pay \$100 "in Canada money," if executed *and* payable in New York. Valid, if payable in Canada.<sup>8</sup>
7. Pay C. or order \$100 "in current bank notes."<sup>9</sup>

The following are valid:

8. An instrument promising to pay £100 10s. 5d., executed and payable in New York.<sup>10</sup>
9. Pay C. or order \$100 "in currency,"<sup>11</sup> "in current funds," or "in current funds of the State of Ohio."<sup>12</sup>

<sup>1</sup> *Klauber v. Biggerstaff* (1879), 47 Wis. 551; *Thompson v. Sloan* (1840), 23 Wend. (N. Y.) 71; *Black v. Ward* (1873), 27 Mich. 191.

<sup>2</sup> *Dixon v. Borill* (1856), 3 Macq. H. L. 1.

<sup>3</sup> *Auerbach v. Pritchett* (1877), 58 Ala. 451; Cf. *McCartney v. Smalley* (1860), 11 Ia. 85.

<sup>4</sup> *Quinby v. Merritt* (1850), 11 Humph. (Tenn.) 439; Cf. *McClellan v. Coffin* (1883), 93 Ind. 456.

<sup>5</sup> *Taylor v. Tompkins* (1881), 1 Tex. App. (Civil Cas.) 588.

<sup>6</sup> *Morton v. Naylor* (1841), 1 Hill (N. Y.) 583.

<sup>7</sup> *Buller, N. P.* 272.

<sup>8</sup> *Thompson v. Sloan* (1840), 23 Wend. (N. Y.) 71; Cf. *Black v. Ward* (1873), 27 Mich. 191.

<sup>9</sup> *Little v. Phoenix Bank* (1842), 2 Hill (N. Y.) 425; *Irvine v. Lowry* (1840), 14 Pet. (U. S.) 293; *McCormick v. Trotter* (1823), 10 S. & Ll. (Pa.) 94. *Contra. Sweetland v. Creigh* (1846), 15 O. 118; if not notes of a particular bank, *Shamokin Bank v. Street* (1864), 16 O. St. 1.

<sup>10</sup> *Thompson v. Sloan. supra.*

<sup>11</sup> *Klauber v. Biggerstaff* (1879), 47 Wis. 551; *Frank v. Wessels* (1876), 64 N. Y. 155; *Drake v. Markle* (1863), 21 Ind. 433; *Marine Bank v. Rushmore* (1862), 28 Ill. 43; *Butler v. Paine* (1863), 8 Minn. 324.

<sup>12</sup> *American Emigrant Co. v. Clark* (1878), 47 Ia. 671; *White v. Richmond* (1847), 16 O. 5; *Wright v. Hart* (1863), 44 Pa. St. 454.

Order to  
drawee

NOTE.—(1) *Instruments payable in merchandise.* The rule is uniform in denying to such instruments the attributes of commercial paper, though in Vermont and Massachusetts they import a consideration, but are not negotiable.<sup>1</sup> Statutes in several States have, however, made such paper negotiable. (2) *Instruments payable in bank notes, currency, etc.* As to these, the rule in England is much more strict than in America, though relaxed somewhat in *Rumball v. Met. Bank* (1877), 2 L. R. Q. B. D. 194, where it was held that scrip certificates of a banking company, payable to bearer, were negotiable for the purpose of passing with a good title to a *bona fide* purchaser for value, who took them without notice that the vendor had no title (following *Goodwin v. Robarts* (1876), 1 L. R. Ap. Ca. 476, as to foreign scrip). How far such documents would have the other incidents of negotiable instruments was not decided. Cf. Art. 278, note under seal. The American decisions have not been uniform even in the same State, and no rule can be laid down that will reconcile all the cases. But the tendency seems to be to use the term “money” in a very wide sense, including not merely what is legal tender, but “whatever is lawfully and actually current in buying and selling, of the value, and as the equivalent of coin.”<sup>2</sup> In some cases the courts take judicial notice,<sup>3</sup> and in others evidence is received to show its character as a “circulating medium.”<sup>4</sup> See subject discussed and authorities reviewed in *Black v. Ward* (1873), 27 Mich. 191.

*Explanation 4.*—The order must not require the drawee to do any act in addition to the payment of money.<sup>5</sup>

#### ILLUSTRATIONS.

The following are not bills:

1. Pay C. or order \$100, and deliver up the wharf to him.<sup>6</sup>
2. “ “ \$100, and take up my note for that amount.<sup>7</sup>

<sup>1</sup> *Dennison v. Tyson* (1845), 17 Vt. 549; *Jones v. Fales* (1808), 4 Mass. at 254.

<sup>2</sup> *Klauber v. Biggerstaff* (1879), 47 Wis. at 557.

<sup>3</sup> *Judah v. Harris* (1821), 19 Johns. (N. Y.) 144.

<sup>4</sup> *American Emigrant Co. v. Clark* (1878), 47 Ia. 671.

<sup>5</sup> *Follett v. Moore* (1849), 4 Exch. at 416.

<sup>6</sup> *Martin v. Chantry* (1747), 2 Stra. 1271.

<sup>7</sup> *Cook v. Satterlee* (1826), 6 Cow. (N. Y.) 108; Cf. *Gillilan v. Myers* (1863), 31 Ill. 525.

The following are valid:

3. A note in usual form, to which is added, "the contents of this note to be appropriated to the payment of the X mortgage."<sup>1</sup>

Order to  
drawee.

4. A note in usual form, to which is added, "waiving right of appeal and of all valuation and exemption laws."<sup>2</sup>

5. A note in usual form, to which is annexed a power of attorney to confess judgment thereon.<sup>3</sup>

NOTE.—In *Illustrs. 3, 4 and 5*, the instrument has all the requisites of a promissory note, with which the added stipulations are in no way inconsistent, but, as to the last two examples, "after the note falls due and is unpaid, facilitate the collection by waiving certain rights which he (maker) might exercise to delay or impede it."<sup>4</sup> Cf. Art. 13. Cf. also, Art. 277, note in alternative.

### *Sum Payable.*

Art. 11. A bill may be drawn for any sum.

Sum  
payable.

NOTE.—In England, by 48 Geo. 3, c. 88, § 2, negotiable bills or notes for less than 20s. were made void, but this statute was repealed by the Code, and there is now no limit to the sum for which a bill, note or check may be drawn.

Art. 12. The sum for which a bill is drawn must be expressed.<sup>5</sup>

Statement  
of sum.

### ILLUSTRATIONS.

1. Bill in this form, "Pay to my order \$——." Evidence is not admissible to show that this is a bill for \$100.<sup>6</sup>

2. "Pay C. or order sixteen ——." No figures in the margin. Invalid.<sup>7</sup>

<sup>1</sup> *Treat v. Cooper* (1842), 22 Me. 208; Cf. *Preston v. Whitney* (1871), 23 Mich. 260.

<sup>2</sup> *Zimmerman v. Anderson* (1871), 67 Pa. St. 421; *Woolen v. Ulrich* (1878), 64 Ind. 120.

<sup>3</sup> *Cushman v. Welsh* (1869), 19 O. St. 536; Cf. *Kirk v. Ins. Co.* (1875), 39 Wis. 138.

<sup>4</sup> *Zimmerman v. Anderson* (*supra*); *Woolen v. Ulrich* (*supra*).

<sup>5</sup> *R. v. Elliott* (1777), 1 Leach. C. C. 175; French Code, Art. 110; German Exchange Law, Art. 4; Cf. Art. 23; and *Pothier*, No. 35.

<sup>6</sup> *Norwich Bank v. Hyde* (1839), 13 Conn. 279; Cf. *Saunderson v. Piper* (1839), 5 Bing. N. C. at 431. See Art. 23.

<sup>7</sup> *Brown v. Beebe* (1814), 1 D. Chip. (Vt.) 227.



Statement  
of sum.

3. Bill in this form, "Pay to my order twenty-five, ten shillings." This is sufficient as a bill for 25l. 10s.<sup>1</sup>

4. "Pay C. or order fifty-two 25-100." No figures in the margin. Valid.<sup>2</sup>

*Explanation 1.*—If the sum payable be expressed in words and also in figures, and there is a discrepancy between the two, the words prevail.<sup>3</sup>

#### ILLUSTRATION.

A bill is drawn, "Pay C. or order two hundred dollars." In the margin is superscribed \$250. This is a bill for \$200 only.<sup>4</sup>

*Explanation 2.*—The figures may supply an omission in the words.<sup>5</sup>

#### ILLUSTRATION.

A bill is drawn, "Pay C. or order one hundred." In the margin is inserted \$100. This is a bill for \$100.<sup>6</sup>

NOTE.—If the sum payable can be gathered from any part of the *instrument*, whether from the figures or the form of expression (Illustr. 4, *supra*.) in the body of the bill, it is valid. The written words govern, as the figures in the margin are no part of the bill, and can be referred to only in case of doubt.<sup>7</sup> German Exchange Law, Art. 5, provides that if the amount be expressed both times in figures, or both times in words, and there is a discrepancy, the smaller sum is the amount payable.

Sum to be  
certain.

Art. 13. The sum payable must be a certain and definite sum.

#### ILLUSTRATIONS.

The following orders or promises are invalid:

<sup>1</sup> *Phipps v. Tanner* (1833), 5 C. & P. 488; *Beardsley v. Hill* (1871), 61 Ill. 354.

<sup>2</sup> *Murrill v. Handy* (1853), 17 Mo. 406.

<sup>3</sup> *Saunderson v. Piper* (1839), 5 Bing. N. C. 431; German Exchange Law, Art. 5.

<sup>4</sup> *Id.*; Cf. *Mears v. Graham* (1846), 8 Blackf. (Ind.) 144.

<sup>5</sup> *R. v. Elliott* (1777), 1 Leach. C. C. 175.

<sup>6</sup> *Id.*; *Sweetser v. French* (1847), 13 Met. (Mass.) 262; *Corgan v. Frew* (1865), 39 Ill. 31.

<sup>7</sup> *Riley v. Dickens* (1857), 19 Ill. 29; Cf. *Burnham v. Allen* (1854), 1 Gray (Mass.) 496.

1. Pay C. or order \$100, and all other sums which may be <sup>Sum to be certain.</sup> due to him.<sup>1</sup>
  2. " " the proceeds of a shipment of goods, value \$2,000, consigned by me to you.<sup>2</sup>
  3. " " the balance due to me for building the Baptist College Chapel.<sup>3</sup>
  4. " " \$50 or \$60.<sup>4</sup>
  5. " " \$100, and the demands of the sick club.<sup>5</sup>
  6. " " \$100, and all fines according to rule.<sup>6</sup>
  7. " " \$100, with interest the same as savings banks pay.<sup>7</sup>
  8. " " \$100, in two years with interest, or without interest, if paid within one year.<sup>8</sup>
  9. An instrument in form of a note, but containing a provision that the maker may pay at any time before maturity, "interest to be deducted accordingly."<sup>9</sup>
- The following are valid:
10. A promise to pay \$10 per acre for the X lot of land, becomes valid when the number of acres is indorsed thereon.<sup>10</sup>
  11. A promise to pay \$100 without interest on or before Jan. 1st, 1882.<sup>11</sup>
  12. A promise to pay \$100 and reasonable (or ten per cent.) attorney's fees, if not paid at maturity and suit is instituted.<sup>12</sup>

<sup>1</sup> *Smith v. Nightingale* (1818), 2 Stark. 275.

<sup>2</sup> *Jones v. Simpson* (1823), 2 B. & C. 318; Cf. *Cushman v. Haynes* (1838), 20 Pick. (Mass.) 132.

<sup>3</sup> *Crowfoot v. Gurney* (1832), 9 Bing. 372.

<sup>4</sup> *Fralick v. Norton* (1851), 2 Mich. 130; Cf. *Parsons v. Jackson* (1878), 99 U. S. 434.

<sup>5</sup> *Bolton v. Dugdale* (1833), 4 B. & Ad. 619.

<sup>6</sup> *Ayrey v. Fearnside* (1838), 4 M. & W. 168.

<sup>7</sup> *Whitwell v. Winslow* (1883), 134 Mass. 343.

<sup>8</sup> *Lamb v. Story* (1881), 45 Mich. 488.

<sup>9</sup> *Way v. Smith* (1873), 111 Mass. 523; *Stults v. Silca* (1875), 119 Mass. 137.

<sup>10</sup> *Smith v. Clopton* (1849), 4 Tex. 109.

<sup>11</sup> *Helmer v. Krolick* (1877), 36 Mich. 371; *Mattison v. Marks* (1875), 31 Mich. 421.

<sup>12</sup> *Sperry v. Horr* (1871), 32 Ia. 184; *Bullock v. Taylor* (1878), 39 Mich. 137; *Stoneman v. Pyle* (1871), 35 Ind. 103; *Howenstein v. Barnes* (1879), 5 Dillon (C. Ct.) 482; *Meachim v. Pinson* (1882), 60 Miss. 217; *Trader v. Chidester* (1883), 41 Ark. 242. Contra, *Woods v. North* (1877), 84 Pa. St. 407; *First Nat. Bank v. Gay* (1876), 63 Mo. 33; *Jones v. Radatz* (1880), 27 Minn. 240; *First Nat. Bank v. Bynum* (1881), 84 N. C. 24; *Johnston v. Speer* (1879), 92 Pa. St. 227; *First Nat. Bank of*

Sum to be  
certain.

13. A promise to pay \$100 "but if not paid at maturity to bear ten per cent. interest."<sup>1</sup>

NOTE.—The notes in Illustrs. 10 and 11 are valid on the ground stated *ante*, Art. 10 Exp. 4, note. As long as the note retains the peculiar incidents of commercial paper, that is, up to maturity, the amount payable is fixed and definite, and no extrinsic evidence is necessary to ascertain it. An indorsee can enforce the stipulation for attorney's fees.<sup>2</sup> In some States, such notes are void because usurious.<sup>3</sup>

*Explanation 1.*—The fact that the amount payable is payable by instalments,<sup>4</sup> or payable with interest, or that it is to be calculated according to an *indicated* rate of exchange, does not make it uncertain.

#### ILLUSTRATIONS.

The following are valid:

1. Pay C. or order \$100 "with lawful interest."<sup>5</sup>
2. " " at the exchange, as per indorsement."<sup>6</sup>

Invalid:

3. Pay C. or order \$100 "with current exchange on New York."<sup>7</sup>

NOTE.—The law seems clearly against the validity of a bill payable with current exchange, for two reasons: (1) The fluctuations in the rate of exchange make it impossible to ascertain the amount payable when the bill is issued. (2) If this were not so, evidence *dehors* the instrument would be necessary to ascertain the amount due at maturity. In the cases cited *contra*, the question is either not raised or not discussed, except in *Smith v. Kendall*, in which Campbell, J., dis-

*Stillwater v. Larsen*. (1884). 60 Wis. 206; *Maryland Fertilizing Co. v. Newman* (1883). 60 Md. 584.

<sup>1</sup> *Houghton v. Francis* (1862). 29 Ill. 244; *Towne v. Rice* (1877), 122 Mass. 67; *Parker v. Plymell* (1880). 23 Kans. 402.

<sup>2</sup> *Hubbard v. Harrison* (1871). 38 Ind. 323.

<sup>3</sup> *Shelton v. Gill* (1842). 11 O. 417; *Meyer v. Hart* (1879), 40 Mich. 517; *Boozar v. Anderson* (1883), 42 Ark. 167.

<sup>4</sup> Art. 19, Expl. 4.

<sup>5</sup> Cf. *Warrington v. Early* (1853). 2 E. & B. 763.

<sup>6</sup> *Rouquette v. Overman* (1875). 10 L. R. Q. B. at 531.

<sup>7</sup> *Lowe v. Bliss* (1860). 24 Ill. 168; *Philadelphia Bank v. Newkirk* (1840). 2 Miles (Pa.) 442; *Read v. McNulty* (1860). 12 Rich. L. (S. C.) 445. *Contra. Smith v. Kendall* (1861). 9 Mich. 241; *Pollard v. Herries* (1803). 3 B. & P. 335; *Leggett v. Jones* (1859). 10 Wis. 34; *Bullock v. Taylor* (1878). 39 Mich. 157.

sents, and *Christiancy, J.*, concurs only on ground that the words "with current exchange" were without significance, as in *Hill v. Todd* (1862), 29 Ill. 101. See a statement of the practice as to the sale of foreign bills and the mode of fixing the exchange, *Suse v. Pompe*, 8 C. B. N. S. at 542. To indorse a rate of exchange without authority is a material alteration, which avoids a bill: *Hirschfeld v. Smith* (1866), 1 L. R. C. P. 340

*Explanation 2.*—When a bill is drawn in one country and payable in another, and the amount payable is expressed in the currency of the former, it must be calculated according to the rate of exchange on the day the bill is payable.

#### ILLUSTRATION.

A. in England draws a bill on B. in France for 100*l.* sterling. The amount in francs which the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable.<sup>1</sup>

*Explanation 3.*—When a bill is drawn in one country payable in another in the currency of the latter, and such currency is depreciated between the time of issue and of payment, the holder is (perhaps) entitled to be paid according to the former value.<sup>2</sup>

#### ILLUSTRATION.

A bill is drawn in England on Portugal for "100 mille rees." After it is drawn, but before it is payable, a depreciated paper currency is introduced. The holder is entitled to be paid in the former currency or to receive its equivalent.<sup>3</sup>

**NOTE.**—This decision seems opposed in principle to *Rouquette v. Overman* (1875), 10 L. R. Q. B. 525, where it was held that the time of payment might be deferred by *ex post facto* legislation, the drawer's liabilities being regulated by the *lex loci solutionis*.

<sup>1</sup> Cf. *Hirschfeld v. Smith* (1866), 1 L. R. C. P. at 358; Belgian Code, Art. 83.

<sup>2</sup> *Da Costa v. Cole* (1688), Skin. 272.

<sup>3</sup> *Id.*

Sum to be  
certain.

*Explanation 4.*—When a bill is expressed to be payable with interest, interest runs from the date of the bill, and the amount payable must be calculated accordingly.<sup>1</sup>

#### ILLUSTRATIONS.

1. Bill payable three years after date, “with interest thereon till paid.” Interest runs from date at the legal rate.<sup>2</sup>

2. Bill payable on demand with interest. Interest runs from the date.<sup>3</sup>

3. C., a married woman, as administratrix, lends \$100 to her husband, who makes a note for the amount, expressed to be payable to C. with interest. Interest runs from the date of the note, although C. could not sue on it during her husband’s lifetime.<sup>4</sup>

4. B. makes a note, expressed to be payable with interest one year after his death. Interest runs from the date of the note.<sup>5</sup>

5. B. makes a note and adds—“If not paid when due, to bear 25 per cent. interest.” Interest runs at the specified rate from date.<sup>6</sup>

NOTE.—If a bill bearing interest is undated, interest runs from date of issue.<sup>7</sup> In the absence of usury laws in force in several States but not in England, there is no limit to the rate the parties may agree on. If no time is expressed for the payment of interest, none is due until maturity.<sup>8</sup> Interest after maturity, whether expressed or allowed by law, is in the nature of damages, as to which see Arts. 213, 220.

<sup>1</sup> *Dorman v. Dibdin* (1826), R. & M. 381; *Williams v. Baker* (1873), 67 Ill. 232.

<sup>2</sup> *Id.*; *Kohler v. Smith* (1852), 2 Cal. 597.

<sup>3</sup> *Pate v. Gray* (1831), 1 Hempst. (C. Ct.) 155. Except bank notes which run from demand, *Ringo v. Biscoe* (1853), 8 Eng. (Ark.) at 584; *Estate of Bank of Penna.* (1869), 60 Pa. St. 471.

<sup>4</sup> *Richards v. Richards* (1831), 2 B. & Ad. 447.

<sup>5</sup> *Roffey v. Greenwell* (1839), 10 A. & E. 222; *Washband v. Washband* (1856), 24 Conn. 500.

<sup>6</sup> *Horn v. Nash* (1855), 1 Ia. 204; *Hackenbury v. Shaw* (1858), 11 Ind. 892.

<sup>7</sup> *Richardson v. Ellett* (1853), 10 Tex. 190.

<sup>8</sup> *Sanders v. McCarthy* (1864), 8 Allen (Mass.) 42.

*Expression of Consideration.*Value  
received.

Art. 14. It is usual, but not necessary, to insert in a bill the words "value received," or some equivalent expression denoting consideration.<sup>1</sup>

NOTE.—By the weight of authority, the bill imports a consideration, though not "for value received," and not negotiable;<sup>2</sup> but in some States it is otherwise if the bill is non-negotiable.<sup>3</sup> See Art. 278, note, effect of a seal. German Exchange Law, Art. 4, does not require the consideration to be stated. By French Code, Art. 110, the nature of the consideration must be stated in the bill. A false statement of value constitutes a "supposition de valeur," and avoids the bill in the hands of parties with notice: *Nouguier*, §§ 282, 283. See *post*, Consideration, Art. 82. By statutes in New York and a few other States, notes given for the purchase of patent rights are required to state that fact, and the transferee of such a note is subject to equities.

*Explanation 1.*—In a Bill of Exchange payable to a third party "value received" means, *prima facie*, value received by the drawer;<sup>4</sup> but in an accepted bill, payable to drawer's order, it means value received by the acceptor.<sup>5</sup>

*Explanation 2.*—When a bill is expressed to be for value received, extrinsic evidence is admissible between immediate parties to prove absence, failure, or illegality of consideration;<sup>6</sup> and though a particular consideration is expressed, extrinsic evidence is admissible to prove a different consideration.<sup>7</sup>

<sup>1</sup> *Hatch v. Trayce* (1840), 11 A. & E. 702; *Mehlberg v. Tisher* (1869), 24 Wis. 607.

<sup>2</sup> *Townsend v. Derby* (1841), 3 Met. (Mass.) 363; *Arnold v. Sprague* (1861), 34 Vt. 402; *Lobadie v. Chouteau* (1866), 37 Mo. 413.

<sup>3</sup> *Bristol v. Warner* (1848), 19 Conn. 7; *Barnes v. Ward* (1863), 51 Me. 91; Cf. *Hoyt v. Jaffray* (1862), 29 Ill. 104.

<sup>4</sup> *Grant v. DaCosta* (1815), 3 M. & S. 351; *Benjamin v. Tillman* (1840), 2 McL. (C. Ct.) 213.

<sup>5</sup> *Highmore v. Primrose* (1816), 5 M. & S. 65; *Thurman v. VanBrunt* (1851), 19 Barb. (N. Y.) 409.

<sup>6</sup> *Green v. Shepherd* (1863), 5 Allen (Mass.), 589. (absence); *Aldrich v. Stockwell* (1864), 9 Allen, 45, (failure); *Baker v. Collins* (1864), 9 Allen, 253 (illegality). Arts. 91-95.

<sup>7</sup> *Miller v. McKenzie* (1884), 95 N. Y. 575; *Blum v. Mitchell* (1877),

Value  
received.

## ILLUSTRATIONS.

1. A note is expressed to be given "for commission for business transacted." In an action by payee against maker, evidence is admissible to show that the consideration wholly failed, and that the payee never earned his commission.<sup>1</sup>

2. A note is expressed to be given "for money loaned." Evidence is admissible to show that the note was given in consideration of future services to be rendered by the payee.<sup>2</sup>

3. C., the payee of a bill expressed to be for value received, sues the acceptor. The acceptor may show that the bill was drawn and accepted for C.'s accommodation.<sup>3</sup>

*Explanation 3.*—A bill must not be expressed to be given for an executory consideration.<sup>4</sup>

NOTE.—An executory (*i. e.* future) consideration expressed on the instrument would render it conditional, and so invalid as a bill: Cf. Art. 10.

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*Date of Making.*

Date of  
making.

Art. 15. It is usual but not necessary, to insert in a bill the date on which it is drawn.<sup>5</sup>

*Explanation.*—A bill, expressed to be payable after date, should be dated; but evidence is admissible to show on what day such bill, if undated, was issued, and it takes effect from that time.<sup>6</sup>

59 Ala. 535; *Ramsey v. Young* (1881), 69 Ala. 157; *Cocke v. Blackburn* (1880), 57 Miss. 689; *Everhart v. Puckett* (1881), 73 Ind. 409. *Contra, Rideout v. Bristol* (1830), 1 Cr. & J. 231; *Hill v. Wilson* (1873), 42 L. J. Ch. 817; *Nelson v. Serle* (1839), 4 M. & W. 795; *Knill v. Williams* (1809), 10 East. 431; *Johnson v. Sutherland* (1878), 39 Mich. 579.

<sup>1</sup> *Abbott v. Hendricks* (1840), 1 Man. & Gr. 791.

<sup>2</sup> *Miller v. McKenzie*, (1884), 95 N. Y. 575; *Pierce v. Hight* (1881), 76 Ind. 355; *Dickin v. Morgan* (1880), 54 Iowa. 684.

<sup>3</sup> Cf. *Thomson v. Clubley* (1836), 1 M. & W. 212; *Stephens v. Bank* (1878), 88 Pa. St. 157. But he cannot show no consideration for the acceptance, *Norak v. Excelsior Stone Co.* (1875), 78 Ill. 307.

<sup>4</sup> *Drury v. Macauley* (1846), 16 M. & W. 146; *Hays v. Gwin* (1862), 19 Ind. 19.

<sup>5</sup> *Mehlberg v. Tisher* (1869), 24 Wis. 607.

<sup>6</sup> *Richardson v. Ellett* (1853), 10 Tex. 190; Cf. *Giles v. Bourne* (1817), 6 M. & S. 73; *Seldonridge v. Connable* (1869), 32 Ind. 375.

## ILLUSTRATION.

Date of  
making.

A. draws, without dating, a bill on B., payable to C. three months after date. C. can give evidence to show on what day the bill was issued to him.

NOTE.—Byles, Chitty and Parsons are of this opinion, relying on *Giles v. Bourne*,<sup>1</sup> where, however, the point arose on the pleadings and not on the evidence. No question could arise except in the case of a bill payable after date: Cf. the Scotch law, under 19 & 20 Vict. c. 60, § 10. German Exchange Law, Art. 4, requires a bill to be dated; so does the French Code, Art. 110. Pothier (No. 36), writing before the Code, says "Want of a date or mistake therein cannot be taken advantage of by the drawer of the bill, or by the drawee if he accepts it."

Art. 16. A bill may be ante-dated or post-dated.<sup>2</sup> Ante-dating  
or post-dating.

*Explanation.*—Evidence is admissible to show on what day such bill was issued, and it takes effect from that time.

## ILLUSTRATIONS.

1. A. draws a bill on B., bearing date May 1, payable to C.'s order. C. indorses to D., who sues A. It appears that C. died in April. D. may show that the bill was post-dated, and that C. really indorsed it. He can then recover.<sup>3</sup>

2. C. sues B. on a partnership note dated in 1842, and signed by his partner in the firm name. The partnership was dissolved in 1840. C. may show that the bill was issued before dissolution, and post-dated. He can then recover.<sup>4</sup>

3. D. sues B. on a check. D. may recover as a holder before maturity, although shown to have taken a year after its date, if it was in fact post-dated one year when issued.<sup>5</sup>

<sup>1</sup> *Giles v. Bourne* (1817), 6 M. & S. 73.

<sup>2</sup> *Usher v. Dauncey* (1814), 4 Camp. 97; *Barker v. Sterne* (1854) 9, Exch. 684, ante-dated; *Gatty v. Fry* (1877), 2 L. R. Ex. D. 265; *Frazier v. Trow's Printing, etc., Co.* (1881), 24 Hun (N. Y.), 281, post-dated check.

<sup>3</sup> *Pasmore v. North* (1811), 18 East. 517.

<sup>4</sup> *Lansing v. Gaine* (1807), 2 Johns. (N. Y.) 300.

<sup>5</sup> *Cowing v. Altman* (1877), 71 N. Y. 435; Cf. *Drake v. Rogers* (1851), 32 Me. 524.



Ante-dating  
or post-  
dating.

4. C. sues B. on a note bearing date on a Sunday. He may recover if it appears to have been issued on a Monday.<sup>1</sup>

5. May 5th, C. sues B. on a note dated May 1st, payable one day after date without grace. C. cannot recover if it appears to have been issued on May 5th, and ante-dated.<sup>2</sup>

*Exception.*—Such evidence is not admissible to invalidate the title of a *bona fide* holder for value.

#### ILLUSTRATIONS.

1. June 4th, D., a *bona fide* holder for value, sues B. on a note dated May 1st, and payable one month after date. B. cannot show that the note was issued June 1st, and dated May 1st by mistake.<sup>3</sup>

2. In suit of *bona fide* holder for value against the maker of a note bearing date on a secular day, evidence is inadmissible to show that it was in fact issued on a Sunday.<sup>4</sup>

NOTE.—If ante or post-dated, the date fixes the time from which to determine its maturity, except as against a *bona fide* holder for value.<sup>5</sup> See *passim*, *Re Gomersall* (1875), 45 L. J. Bank. 1, as to drawing ante-dated bills to defraud creditors.

Presumption  
as to date.

Art. 17. A bill is *prima facie* presumed to have been issued on the day which it bears date.<sup>6</sup>

*Exception 1.*—A bill bearing date on a Sunday is not presumed to have been issued on that day.<sup>7</sup>

NOTE.—A bill issued on Sunday is not void at common law,<sup>8</sup> but by statutes in most of the States, resembling the 29 Car. 2, c. 7, a bill issued (Cf. Art. 246) on Sunday is void be-

<sup>1</sup> *King v. Fleming* (1874), 72 Ill. 21.

<sup>2</sup> *Raeffe v. Moore* (1877), 58 Ga. 94.

<sup>3</sup> *Huston v. Young* (1851), 33 Me. 85.

<sup>4</sup> *Knox v. Clifford* (1875), 38 Wis. 651; *Trieber v. Bank* (1876), 31 Ark. 128; *Ball v. Powers* (1879), 62 Ga. 757.

<sup>5</sup> *Bunpass v. Timme* (1856), 3 Sneed (Tenn.), 459; *Powell v. Waters* (1826), 8 Cow. (N. Y.) 669.

<sup>6</sup> *Roberts v. Bethell* (1852), 12 C. B. at 778; *Emery v. Vinall* (1846), 26 Me. 295.

<sup>7</sup> *Begbie v. Levi* (1830), 1 Cr. & J. 180; *Dohoney v. Dohoney* (1870), 7 Bush (Ky.), 217.

<sup>8</sup> *O'Rourke v. O'Rourke* (1880), 43 Mich. 58.

tween immediate parties,<sup>1</sup> and incapable of ratification,<sup>2</sup> but <sup>Presumption</sup> valid in hands of a *bona fide* holder for value, if dated on a secular day,<sup>3</sup> either on the ground of estoppel,<sup>4</sup> or because the statute does not declare the bill void to all intents and purposes.<sup>5</sup> That the bill bears date on a Sunday, is immaterial if in fact issued on a secular day.<sup>6</sup> The date of the bill, *e. g.*, "March 6, 1881," is itself notice to the holder of its issue on Sunday, as the almanac is part of the law of the land.<sup>7</sup>

### *Time of Payment.*

Art. 18. A bill may be payable (1) on demand, <sup>Bill payable</sup> (2) at sight, or (3) at a determinate future time. <sup>on demand.</sup>

*Explanation 1.*—A bill is payable on demand which is expressed to be so payable, or in which no time for payment is expressed.<sup>8</sup>

### ILLUSTRATIONS.

1. Payable "when demanded," or "at any time when called for."<sup>9</sup>

2. Payable "in such instalments, and at such times as C. (payee) may require."<sup>10</sup>

3. Payable "on demand, with interest after four months."<sup>11</sup>

NOTE.—A bill accepted or indorsed after it is due, is as against the acceptor or indorser a bill payable on demand.<sup>12</sup> See note on Overdue Bill, Art. 201.

<sup>1</sup> *Sayre v. Wheeler* (1870), 31 Ia. 112; *Duy v. McAllister* (1860), 15 Gray (Mass.), 433.

<sup>2</sup> *Sterens v. Wood* (1879), 127 Mass. 123; *Pope v. Linn* (1863), 50 Me. 83. *Contra*, *King v. Fleming* (1874), 72 Ill. 21.

<sup>3</sup> *Cranson v. Goss* (1871), 107 Mass. 439; *Clinton Bank v. Graves* (1878), 48 Ia. 228; *Triche v. Bank* (1876), 31 Ark. 128.

<sup>4</sup> *Knox v. Clifford* (1875), 38 Wis. 651.

<sup>5</sup> *Vinton v. Peck* (1866), 14 Mich. 257.

<sup>6</sup> *Hill v. Dunham* (1856), 7 Gray (Mass.), 543; *Fritsch v. Heislen* (1867), 40 Mo. 555. But Cf. *Davis v. Barger* (1877), 57 Ind. 54.

<sup>7</sup> *Finney v. Callendar* (1862), 8 Minn. 41; *Sayre v. Wheeler* (1870), 31 Ia. 112.

<sup>8</sup> *Whitlock v. Underwood* (1823), 2 B. & C. 157; *Aldous v. Cornwall* (1868), 3 L. R. Q. B. 573; *Tucker v. Tucker* (1875), 119 Mass. 79; *Holmes v. West* (1851), 17 Cal. 623.

<sup>9</sup> *Kingsbury v. Builer* (1832), 4 Vt. 453; *Bowman v. McChesney* (1872), 22 Grat. (Va.) 609.

<sup>10</sup> *White v. Smith* (1875), 77 Ill. 351.

<sup>11</sup> *Loring v. Gurney* (1827), 5 Pick. (Mass.) 15; Cf. *First Nat. Bank v. Price* (1879), 52 Ia. 570.

<sup>12</sup> Cf. Art. 34, Time of Acceptance. *Patterson v. Todd* (1852), 18 Pa. St. 426; *Rodgers v. Rosser* (1876), 57 Ga. 319.

Bill payable  
on demand.

*Explanation 2.*—A bill is payable at sight which is expressed to be so payable, or “on presentation” or “on demand at sight.”<sup>1</sup>

NOTE.—By the British Code, § 10, (1) (a), re-enacting 34 & 35 Vict. c. 74, bills “at sight” or “on presentation,” are for all purposes to be deemed payable on demand.

Bill payable  
in futuro.

Art. 19. A bill payable at a future time may be expressed to be payable—

- (1.) At a fixed future time.
- (2.) At a fixed period after date.
- (3.) At a fixed period after sight.
- (4.) At a time certain to transpire, though indefinite.<sup>2</sup>

*Explanation 1.*—An instrument expressed to be payable on a contingency does not constitute a bill; and the happening of the event does not cure the defect.<sup>3</sup>

#### ILLUSTRATIONS.

The following are valid :

1. Pay C. or order \$100, ten days after the death of X.<sup>4</sup>
2. “ “ two months after H. M. ship “Swallow” is paid off.<sup>5</sup>
3. “ “ on the 1st January when he comes of age.<sup>6</sup>
4. “ “ one year after notice.<sup>7</sup>

<sup>1</sup> *Dixon v. Nuttall* (1834), 1 Cr. M. & R. 307.

<sup>2</sup> *Coleman v. Cooke* (1742), Willes, 393; *Cota v. Buck* (1844), 7 Met. (Mass.) 588; Cf. Art. 10.

<sup>3</sup> *Id.* at 599; *Carlos v. Fancourt* (1794), 5 T. R. 482; *Kelley v. Hemmingway* (1852), 13 Ill. 604; *Miller v. Excelsior Stone Co.* (1878), 1 Bradwell (Ill.) 273.

<sup>4</sup> *Id.*; *Washband v. Washband* (1856), 24 Conn. 500.

<sup>5</sup> *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood* (1749), 1 Wils. 262. Government is considered sure to pay. *Sed qu.* in America, *Daniel* § 46; Cf. *Henry v. Hazen* (1843); 5 Ark. 401.

<sup>6</sup> *Goss v. Nelson* (1757), 1 Burr. 228.

<sup>7</sup> *Clayton v. Gosling* (1826), 5 B. & C. 360.

5. Pay C. or order \$100, one year after my death.<sup>1</sup> Bill payable  
in futuro.  
 6. " " two months after demand in writing.<sup>2</sup>  
 7. " " on the expiration of a certain lease.<sup>3</sup>

The following are invalid:

8. Pay C. or order \$100, when I marry X.<sup>4</sup>  
 9. " " when he arrives at age. That he is of age at time of suit is immaterial.<sup>5</sup>  
 10. " " thirty days after the arrival of ship "Swallow" at Calcutta.<sup>6</sup>  
 11. " " ninety days after the dissolution of partnership between C. and X. and the settling of the books.<sup>7</sup>  
 12. " " when the estate of X. is settled up.<sup>8</sup>  
 13. " " when a certain suit is terminated *in my favor*; when a certain building is completed; when a certain sale is made; when a certain amount is collected of X.<sup>9</sup>  
 14. " " on the completion of the X. railroad.<sup>10</sup>

<sup>1</sup> *Roffey v. Greenwell* (1839), 10 A. & E. 222; *Conn v. Thornton* (1871), 46 Ala. 587.

<sup>2</sup> *Price v. Taylor* (1860), 5 H. & N. 540; Cf. *Protection Ins. Co. v. Bill* (1863), 31 Conn. 534.

<sup>3</sup> Cf. *Downer v. Tucker* (1858), 31 Vt. 204.

<sup>4</sup> *Pearson v. Garrett* (1694), 4 Mod. 242.

<sup>5</sup> *Kelley v. Hemmingway* (1852), 13 Ill. 604.

<sup>6</sup> *Palmer v. Pratt* (1824), 2 Bing. 185; *Grant v. Wood* (1858), 12 Gray (Mass.), 220. But Cf. *Pinkham v. Macy* (1845), 9 Met. (Mass.) 174 (no objection raised.)

<sup>7</sup> *Sackett v. Palmer* (1857), 25 N. Y. 179.

<sup>8</sup> *Husband v. Epling* (1876), 81 Ill. 172.

<sup>9</sup> *Shelton v. Bruce* (1836), 9 Yerg. (Tenn.), 24; *Miller v. Excelsior Stone Co.* (1878), 1 Bradwell (Ill.) 273; *DeForrest v. Frary* (1826), 6 Cow. (N. Y.) 151; *Corbett v. Georgia* (1858), 24 Ga. 287.

<sup>10</sup> *Blackman v. Lehman* (1879), 63 Ala. 547; S. C., 35 Am. R. 57. (Municipal bonds payable to bearer.)

Bill payable  
in futuro.

15. Pay C. or order \$100, three months after date, but payee or his assigns may extend time of payment indefinitely, as he or they may see fit.<sup>1</sup>

NOTE.—Under the French Code, Art. 129, and German Exchange Law, Art. 4, such forms as are given in Illustrations 1 to 7 would probably be invalid. A bill, however, may be made payable at a particular fair or market (*en foire*), though the day on which it will be held is not known. Such bills seem to have been anciently known in England as “billæ nundinales.”<sup>2</sup>

*Explanation 2.*—If a bill is payable at a time certain to transpire, it may be expressed to be payable before that time on the happening of a contingency.<sup>3</sup>

#### ILLUSTRATIONS.

The following are valid :

1. Pay C. or order \$100 on or before three years from date.<sup>4</sup>
2. “ “ one year from date, or before, if realized from the sale of a certain machine.<sup>5</sup>
3. “ “ Dec. 25th, 1819, or when he completes the building according to contract.<sup>6</sup>
4. “ “ in six months, or as soon as I can make the money out of the said patent right.<sup>7</sup>

<sup>1</sup> *Smith v. Van Blarcom* (1881), 45 Mich. 371; *Woodbury v. Roberts* (1882), 59 Iowa, 348.

<sup>2</sup> Cf. *Colehan v. Cooke* (1742), Willes at 399. See French Code, Art. 133; German Exchange Law, Art. 33.

<sup>3</sup> *Ernst v. Steckman* (1873), 74 Pa. St. 13. *Contra, Alexander v. Thomas* (1851), 16 Q. B. 335.

<sup>4</sup> *Helmer v. Krolick* (1877), 36 Mich. 371; *Jordan v. Tate* (1869), 19 O. St. 586.

<sup>5</sup> *Woolen v. Ulrich* (1878), 64 Ind. 120; *Charlton v. Reed* (1883), 61 Iowa, 166; *Cisne v. Chidester* (1877), 85 Ill. 523; *Cota v. Buck* (1844), 7 Met. (Mass.) 588.

<sup>6</sup> *Sterens v. Blunt* (1810), 7 Mass. 240.

<sup>7</sup> *Palmer v. Hummer* (1872), 10 Kans. 464.

5. Pay C. or order \$100 on demand or in three years, with <sup>Bill payable</sup> interest during said term, or for <sup>in futuro.</sup> such further time as said principal or any part thereof shall remain unpaid.<sup>1</sup>

NOTE.—In the above cases, it will be noticed, (1) The promise is absolute; it is construed (Art. 58) to be payable at the time specified, whether the money is realized out of the sale, the building completed, etc., or not. If otherwise, the bill would be conditional, and invalid as such. (2) The bill is not payable “with interest.” If so it would be invalid as a bill, since the sum payable would be uncertain (Art. 13).<sup>2</sup> This is the ground of the Mass. decisions, and *Hubbard v. Mosely* (1858), 11 Gray, 170, is not in conflict with the well settled doctrine in America that the time may be indefinite if it is certain to arrive. The proviso in the note in that case, that if paid before maturity, the payee should surrender it to maker, necessarily destroyed its *negotiability* though payable “to order,” which was the point decided. The case of *Cota v. Buck*, (1844), 7 Met. (Mass.) 588, is still authority. But see *Bigelow*, p. 20.

*Explanation 3.*—A bill may be expressed to be payable, in effect, in a reasonable time.<sup>3</sup>

#### ILLUSTRATIONS.

The following are valid, and payable absolutely within a reasonable time.

1. Pay C. or order, \$100, “when convenient.”<sup>4</sup>
2. “ “ “when I sell my place.”<sup>5</sup>
3. “ “ “as soon as collected from my accounts at P.”<sup>6</sup>

*Explanation 4.*—A bill may be expressed to be payable by stated instalments, and may provide that upon default in payment of one instalment the whole is to become due.<sup>7</sup>

<sup>1</sup> *Mahoney v. Fitzpatrick* (1882), 133 Mass. 151.

<sup>2</sup> *Way v. Smith* (1873), 111 Mass. 523; *Stults v. Silva* (1875), 119 Mass. 137.

<sup>3</sup> *Capron v. Capron* (1872), 44 Vt. 410. *Contra*, *Nunes v. Dantel* (1873), 19 Wall. (U. S.) 560.

<sup>4</sup> *Works v. Hershey* (1872), 35 Ia. 340; *Lewis v. Tipton* (1859), 10 O. St. 88. *Contra*, *Ex parte Tootell* (1798), 4 Ves. 372.

<sup>5</sup> *Crooker v. Holmes* (1875), 65 Me. 195.

<sup>6</sup> *Ubsdell v. Cunningham* (1855), 22 Mo. 124. *Sed qu.* if a fair construction.

<sup>7</sup> *Carlton v. Kenealy* (1843), 12 M. & W. 139; *Crook v. Horne* (1873), 29 L. T. N. S. 369; *Cf. Sea v. Glover* (1878), 1 Bradwell (Ill.) 335.

Bills payable  
in futuro.

## ILLUSTRATIONS.

1. Pay C. or order \$100, "by two equal instalments, due 1st January and 1st July." This is valid.<sup>1</sup>
2. " " "in such manner and proportion and at such a time and place as he shall require."<sup>2</sup>
3. " " "by instalments," not stating date or amount. This is invalid.<sup>3</sup>
4. " " "by ten equal instalments, payable, etc., all instalments to cease on the death of X." This is invalid.<sup>4</sup>

Computation  
of time of  
payment.

Art. 20. In computing time, unless the contrary be expressed,<sup>5</sup> three Days of Grace are added to the nominal time of payment in the case of all bills<sup>6</sup> not payable on demand;<sup>7</sup> on such bills the nominal time of payment is determined by excluding the day from which time is to run, and including the day of payment.<sup>8</sup>

"Month" means calendar month.<sup>9</sup>

<sup>1</sup> *Gaskin v. Davis* (1860), 2 F. & F. 294; Cf. *Sanders v. McCarthy* (1864), 8 Allen (Mass.), 42.

<sup>2</sup> *White v. Smith* (1875), 77 Ill. 351; Cf. *Colgate v. Buckingham* (1863), 39 Barb. (N. Y.) 177.

<sup>3</sup> *Moffat v. Edwards* (1841), 1 Car. & M. 16. *See qu.* Why not payable on demand if no time expressed?

<sup>4</sup> *Worley v. Harrison* (1855), 3 A. & E. 669.

<sup>5</sup> *Durnford v. Patterson* (1820), 7 Mart. (La.) 460.

<sup>6</sup> After date, *Reed v. Wilson* (1879), 41 N. J. (L.) 29; *Wood v. Corl* (1842), 4 Met. (Mass.), 203. After sight, *Craig v. Price* (1861), 28 Ark. 638. At sight, *Webb v. Fairmaner* (1838), 3 M. & W. 473; *Cribbs v. Adams* (1859), 13 Gray (Mass.), 597; *Lucas v. Ladew* (1859), 28 Mo. 342. *See contra*, *Trask v. Martin* (1852), 1 E. D. Sm. (N. Y.), 505; *Strong v. King* (1864), 35 Ill. 9.

<sup>7</sup> Cf. *Andrew v. Blachly* (1860), 11 O. St. 89; *Salter v. Burt* (1838), 20 Wend. (N. Y.), 205 (check).

<sup>8</sup> *Campbell v. French* (1795), 6 T. R. at 212; *Ammidown v. Woodman* (1850), 31 Me. 580; Cf. German Exchange Law, Art. 32.

<sup>9</sup> *Webb v. Fairmaner* (1838), 3 M. & W. 473; *McMurchu v. Robinson* (1841), 10 O. 496; Cf. German Exchange Law, Art. 32; French Code, Art. 132.

## ILLUSTRATIONS.

Computation  
of time of  
payment.

1. A note dated 31st January is payable one month after date, "without grace." It is due on February 28. A similar note, dated January 1, would be payable on February 1.<sup>1</sup>

2. A note for \$100 is made payable by two equal instalments, on January 1 and February 1. The instalments fall due on January 4 and February 4.<sup>2</sup>

3. A bill dated January 1 is payable thirty days after date. It is due on February 3.<sup>3</sup>

4. "Pay the bearer \$100 on April 1st, 1871." The bill is entitled to grace.<sup>4</sup>

5. A non-negotiable note, not payable on demand, is entitled to days of grace.<sup>5</sup>

NOTE.—The authorities are in conflict as to when suit may be begun against the maker or acceptor. It is held that suit may be commenced (1) Not until the day after the last day of grace, since the maker has the whole of that day in which to pay the note, and is not in default until its expiration.<sup>6</sup> (2) On the last day of grace after due demand and refusal.<sup>7</sup> (3) On the last day of grace after reasonable hours for payment (Art. 163) have elapsed.<sup>8</sup> Cf. Art. 252, Expl. 2, note; suit against indorser. It is believed that all countries, except those where the Greek Church is the prevailing religion, use the New Style, or Gregorian Calendar. The number of days of grace allowed differs in different countries. By French Code, Art. 135, and German Exchange Law, Art. 33, days of grace are abolished and the N. Y. Civil Code (Draft of 1888), § 2829, proposes to do the same. The Bank of England pays its own bills without taking grace. Days of grace may be waived, and a valid tender of amount due made on day of legal maturity, as against holder.<sup>9</sup>

<sup>1</sup> Cf. *Roehner v. Knickerbocker Ins. Co.* (1875), 63 N. Y. 160.

<sup>2</sup> *Oridge v. Sherborne* (1843), 11 M. & W. 381; Cf. *Coffin v. Loring* (1862), 5 Allen (Mass.), 153.

<sup>3</sup> *Seaton v. Hinneman* (1879), 50 Ia. 395.

<sup>4</sup> *Evertson v. Bank* (1876), 66 N. Y. 14; *Morrison v. Bailey* (1855), 5 O. St. 13. *Contra* in Connecticut, *Bowen v. Newell* (1855), 13 N. Y. 290.

<sup>5</sup> *Smith v. Kendall* (1794), 6 C. R. 123; *Dubuis v. Farmer* (1870), 22 La. An. 478. *Contra*, *Backus v. Danforth* (1824), 10 Conn. 297.

<sup>6</sup> *Osborne v. Moncure* (1829), 3 Wend. (N. Y.), 170; *Bevan v. Eldridge* (1840), 2 Miles (Pa.) 353; *McFarland v. Pico* (1857), 8 Cal. 626.

<sup>7</sup> *Estes v. Tower* (1869), 102 Mass. 65; *Ammidown v. Woodman* (1850), 31 Me. 580; *Daly v. Proetz* (1872), 20 Minn. 411.

<sup>8</sup> *McKenzie v. Durant* (1855), 9 Rich. L. (S. C.), 61; Cf. *Veazie Bank v. Winn* (1855), 40 Me. 62.

<sup>9</sup> *Wyckoff v. Anthony* (1832), 90 N. Y. 442.



Computation  
of time of  
payment

"Sight" in a Bill of Exchange means acceptance or protest for non-acceptance, *i. e.* sight evidenced on the bill.<sup>1</sup>

#### ILLUSTRATIONS.

1. The holder of a foreign bill, payable sixty days after sight makes an agreement that if it be dishonored by non-acceptance, he will re-present it for payment at maturity. Acceptance is refused. The time of payment must be calculated from the day the bill was protested, and not from the day of presentment to the drawee for acceptance.<sup>2</sup>

2. A bill is payable at sight. It is presented and accepted Jan. 1st. It is due Jan. 4th.

3. A bill is payable three months after sight. The acceptance bears date Jan. 1. The bill is due on April 4.<sup>3</sup>

4. Bill payable after sight is noted for non-acceptance on January 1. It is accepted *supra protest* on January 5. The time of payment (probably) must be calculated from January 1.<sup>4</sup>

NOTE.—As a promissory note cannot be accepted, "after sight," in a note, means after mere exhibition to the maker.<sup>5</sup> A bill presented for acceptance is usually left for twenty-four hours (Art. 154), with the drawee, but the custom is for the acceptance to bear date the day of presentment, and not the day of return to the holder—*e. g.*, a bill presented on a Saturday is accepted and returned on the Monday; the acceptance should bear date of the Saturday. The holder is probably entitled to this as a matter of right.

"Usance" means customary time, *i. e.*, the time for payment as fixed by custom, having regard to the place where a bill is drawn and the place where it is payable.

<sup>1</sup> *Campbell v. French* (1795), 6 T. R. 200, Ex. Ch.; *Mitchell v. De Grand* (1817), 1 Mason (C. Ct.) 176; Cf. French Code, Art. 131; German Exchange Law, Art. 32.

<sup>2</sup> *Id.*

<sup>3</sup> *Mitchell v. DeGrand* (1817), 1 Mason (C. Ct.) 176.

<sup>4</sup> Such is the practice in England. See *contra, dicta* in *Williams v. Germaine* (1827), 7 B. & C. at 471.

<sup>5</sup> *Sturdy v. Henderson* (1821), 4 B. & Ald. 592; Cf. *Dixon v. Nutall* (1834), 1 C. M. & R. 307; *Cribbs v. Adams* (1859), 13 Gray (Mass.), at 600.

## ILLUSTRATION.

Computation  
of time of  
payment.

The usance between London and Amsterdam is one month; therefore a bill drawn in Amsterdam, dated January 1, payable in London at double usance, falls due on March 4.<sup>1</sup>

NOTE.—When the usance is a month, half usance means fifteen days; Cf. *Pothier*, No. 15. The existence of a usance will not be judicially noticed: it must be proved. The practice of drawing bills at usance is nearly obsolete in Europe, and has never prevailed in America. Drawing after date is more convenient, and answers the purpose.

If a bill falls due on a Sunday or legal holiday, if entitled to grace, it is deemed to be due on the preceding day;<sup>2</sup> if not entitled to grace, it is deemed to be due on the succeeding day.<sup>3</sup>

## ILLUSTRATION.

A bill is payable three months after date. The last day of grace is Dec. 25th. The bill is due Dec. 24th, and if that is Sunday, it is due on the 23d. But if the second day of grace is Dec. 25th, it is still due on the 26th.

NOTE.—Inasmuch as days of *grace* were originally allowed as a favor, and therefore contracted rather than extended, by the occurrence of a holiday, it seems that if no grace is allowed, the rule of common law contracts as above stated should apply. But evidence of a usage to the contrary would be admissible.<sup>4</sup> By French Code, Art. 134, a bill which falls due on a *dies non* (*ferié légal*) is payable the day before.

The computation of time is determined by the law of the place of payment if shown.<sup>5</sup>

<sup>1</sup> Cf. *Mutford v. Walcot* (1700), 1 Ld. Raym. 574.

<sup>2</sup> *Reed v. Wilson* (1879), 41 N. J. L. 39; *City Bank v. Cutter* (1826), 3 Pick. (Mass.) 414 (holiday by usage).

<sup>3</sup> *Arery v. Stewart* (1816), 2 Conn. 69; *Salter v. Burt* (1838), 20 Wend. (N. Y.), 205; *Barrett v. Allen* (1841), 10 O. 426; *Kuntz v. Tempel* (1871), 48 Mo. 71. *Contra* (due day before). *Barker v. Parker* (1827), 6 Pick. (Mass.) 80; *Doremus v. Burton* (1860), 5 Biss. (C. Ct.) 57.

<sup>4</sup> *Kilgore v. Bulkley* (1841), 14 Conn. at 392.

<sup>5</sup> *Skelton v. Dustin* (1879), 92 Ill. 49.

Computation  
of time of  
payment.

#### ILLUSTRATIONS.

1. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a moratory law is passed in France postponing the maturity of all current bills for one month. The maturity of this bill is for all purposes, to be determined by French law.<sup>1</sup>

2. By French law, days of grace are not allowed. A bill drawn in France, payable in England, is entitled to three days grace; but a bill drawn in England, payable in France, is not entitled to grace.<sup>2</sup>

#### *Place of Making and Payment.*

Place of  
making.

Art. 21. It is usual, but not necessary, to state in a bill the place where it is drawn.

NOTE.—By 9 Geo. 4, c. 65, a penalty is imposed on the issue or negotiation in England of bills or notes of less than 5*l.*, payable to bearer on demand, which are made or purport to be made in Scotland or Ireland; and see Art. 279. In France, the place where a bill is drawn must be stated, for a bill cannot be drawn and payable in the same place. There must be a possible rate of exchange between the place where it is drawn and the place where it is payable; French Code, Art. 110; *Nouguier*, § 93-105. In Germany the law is the same as in England.

Place of  
payment

Art. 22. The drawer of a Bill of Exchange may or may not indicate a place of payment therein; he may also indicate an alternative place of payment.<sup>3</sup>

NOTE.—By French Code, Art. 110, and German Exchange Law, Art. 4, the place of payment must be stated. As to the effect of the drawer stating or not stating a place of payment, see Art. 166, Presentment for Payment.

*Explanation.*—The drawer of a bill may make it

<sup>1</sup> *Rouquette v. Overman* (1875), 10 L. R. Q. B. 525.

<sup>2</sup> *Id.* at 535-538; Cf. *Bowen v. Newell* (1855), 13 N. Y. 290; *Thorp v. Craig* (1860), 10 Ia. 461.

<sup>3</sup> *Malden Bank v. Balduin* (1859), 13 Gray (Mass.), 154; Cf. *Pollard v. Herries* (1803), 3 B. & P. 335.

payable at the house or place of business of some person other than the drawee.<sup>1</sup> Place of payment.

## ILLUSTRATION.

A. may draw a bill on B., in Liverpool, payable at Messrs. X. & Co.'s, bankers, London.

NOTE.—The person at whose house or place of business a bill is drawn or accepted payable, is sometimes called the “domiciliary,” from the French term “domiciliaire,” and the bill is said to be “domiciled” where payable.

*Inchoate Bills.*

Art. 23. Delivery<sup>2</sup> of an incomplete<sup>3</sup> bill signed or indorsed for use as such,<sup>4</sup> confers a *prima facie* authority<sup>5</sup> upon any successive holder<sup>6</sup> to fill the blanks necessary to its completion;<sup>7</sup> and if the bill be negotiated to a holder for value without notice, the presumption of authority becomes absolute.<sup>8</sup> Blank signatures.

## ILLUSTRATIONS.

1. A. draws a bill on B. payable to ——— or order. Any *bona fide* holder may write his own name in the blank, and sue on the bill.<sup>9</sup>

2. B., who is indebted to X., gives him an acceptance for \$100 on a blank paper. X. dies. His administrator fills up

<sup>1</sup> Cf. French Code, Art. 111.

<sup>2</sup> *Ledwich v. McKim* (1873), 53 N. Y. 307; *Baxendale v. Bennet* (1878), 8 L. R. Q. B. D. 525, C. A. (stolen bill).

<sup>3</sup> Otherwise it would be alteration, Art. 246.

<sup>4</sup> *Nance v. Lary* (1843), 5 Ala. 370; *Moody v. Threlkeld* (1853), 13 Ga. 55; *Putnam v. Sullivan* (1808), 4 Mass. at 54.

<sup>5</sup> *Hatch v. Searles* (1854), 2 Sm. & G. at 152, 153; *Davidson v. Lanier* (1863), 4 Wall. (U. S.) 447.

<sup>6</sup> *Page v. Morrell* (1866), 3 Abb. N. Y. Ap. D. 433.

<sup>7</sup> *Angle v. Ins. Co.* (1875), 92 U. S. 330; *Toomer v. Rutland* (1876), 57 Ala. 379; *Ives v. Bank* (1861), 2 Allen (Mass.) 236.

<sup>8</sup> *Hatch v. Searles*, *supra*; *Whitmore v. Nickerson* (1878), 125 Mass. 496; *Van Duzer v. Howe* (1860), 21 N. Y. 531.

<sup>9</sup> *Crutchley v. Mann* (1814), 5 Taunt. 529; *Sittig v. Birkestack* (1873), 28 Md. 158; *Van Etta v. Evenson* (1871), 28 Wis. 33; *Armstrong v. Harshman* (1878), 61 Ind. 52; *Ives v. Bank* (1861), 2 Allen (Mass.) 236.

Blank signature.

the paper as a bill payable to drawer's order, inserting his own name as drawer. He can sue B. on the bill.<sup>1</sup>

3. B., who is indebted to C., gives him a blank acceptance for 100*l.* and then dies. C. may fill in his own name as drawer and payee after B.'s death, and recover the amount from B.'s estate.<sup>2</sup>

4. B. signs and delivers to C. a note with blank amount to be filled up for \$100. C. fills it up for \$500, and negotiates it to D., who takes it for value without notice. D. can recover of B. the face of the note.<sup>3</sup>

5. B. signs and delivers to C., on March 1st, a note with date blank, payable one month after date. C. dates it February 15th. It is due March 18th, in the hands of a holder for value without notice.<sup>4</sup>

6. D. indorses an instrument reading: "——— after date ——— promise to pay to the order of ——— at ——— — dollars, for value received," and delivers it to B. to be filled up, but expressly stipulates that it shall not be made payable at a bank. D. is liable to holder for value without notice, though filled up payable at a bank.<sup>5</sup>

7. The foregoing instrument is indorsed and delivered to C. with general authority to fill up the blanks. He adds at the end of the note "waiving all valuation laws" or "bearing ten per cent. interest after maturity." A holder for value without notice cannot recover of the indorser. The clause is not a completion but an alteration.<sup>6</sup>

8. D. indorsed and delivered to A. a bill drawn by A. on B., blank as to amount, time of payment, and payee. A. struck out drawee's name, and place of drawing, and filled it up as a

<sup>1</sup> *Scard v. Jackson* (1876), 34 L. T. N. S. 65.

<sup>2</sup> *Carter v. White* (1882), 20 Ch. D. 225, affirmed (1883), 25 Ch. D. 666 C. A.

<sup>3</sup> *Bank v. Curry* (1834), 2 Dana (Ky.), 142; *Van Duzer v. Howe* (1860), 21 N. Y. 531. In England, stamp limits amount, *Schultz v. Astley* (1836), 2 Bing. N. C. 544.

<sup>4</sup> *Page v. Morrell* (1866), 3 Abb. N. Y. Ap. D. 433; *Snyder v. Van Dorders* (1879), 46 Wis. 602.

<sup>5</sup> *Spiller v. James* (1869), 32 Ind. 202, and *Redlich v. Doll* (1873), 54 N. Y. 234. *Contra, Aude v. Dixon* (1851), 6 Exch. 869.

<sup>6</sup> *Holland v. Hatch*, (1858), 11 Ind. 497; Cf. *Holland v. Hatch* (1864), 15 O. St. 464; *Ivory v. Michael* (1863), 33 Mo. 398; *Weyerhauser v. Dun* (1885), 100 N. Y. 150.

promissory note. Holder for value without notice cannot re-  
cover of the indorser.<sup>1</sup> Blank signatures.

*Explanation 1.*—As between immediate parties (Art. 88) the bill must be filled up within a reasonable time.<sup>2</sup> Reasonable time is a question of fact.<sup>3</sup>

*Explanation 2.*—As between immediate parties the bill must be filled up and negotiated in accordance with the authority given.<sup>4</sup>

#### ILLUSTRATIONS.

1. B. signs a note leaving date blank, and blank space after the word "at," where place of payment is usually inserted, and sends it to C. with a letter, saying, "I have left date blank which you will fill out giving as long time as possible." C. cannot recover if he inserts a place of payment in the blank space for that purpose."<sup>5</sup>

2. B. gives X. a blank acceptance for \$500, in order that he may get it discounted for him. X. has the bill filled up as payable to drawer's order, and gets A. to sign as drawer and indorser in a fictitious name. X. then negotiates the bill, and it gets into the hands of E., who takes it *bona fide* for value and without notice. None of the money reaches B.'s hands. E. can sue B.<sup>6</sup>

**NOTE.**—Is the act of the holder in fraudulently filling the blanks, a forgery, or a breach of trust? If forgery, then an innocent holder cannot recover thereon, as it is a nullity; *aliter* if a mere breach of trust. In America the rule of Lord Mansfield in *Russell v. Langstaffe* (1780), 2 Dougl. 514, that "the indorsement on a blank note is a letter of credit for an indefinite sum," has been applied to its full extent, and it is further held to be immaterial that the plaintiff took the note knowing

<sup>1</sup> *Bank v. Douglas* (1862), 31 Conn. 170; Cf. *Luellen v. Hare* (1869), 32 Ind. 211.

<sup>2</sup> *Mulhall v. Neville* (1852), 8 Exch. 391; *Montague v. Perkins* (1853), 22 L. J. C. P. 187.

<sup>3</sup> *Temple v. Pullen* (1853), 8 Exch. 389.

<sup>4</sup> *Hatch v. Searles* (1854), 2 Sm. & G. 147, at 152; *Hanbury v. Lorett* (1868), 18 L. T. N. S. 366; *Davidson v. Lanier* (1866), 4 Wall. (U. S.) 447.

<sup>5</sup> *Toomer v. Rutland* (1876), 57 Ala. 379.

<sup>6</sup> *Schultz v. Astley* (1836), 2 Bing. N. C. 544. Cf. *Farmers Bank v. Garten* (1863), 84 Mo. 119.

Blank signatures.

it to have been given to the holder in blank. He is not thereby put upon inquiry as to the extent of the holder's authority.<sup>1</sup> But the later English cases have limited the doctrine, and what would be held in America only a breach of trust, has been regarded as forgery.<sup>2</sup>

*Explanation 3.*—The bill takes effect and the liabilities of the parties accrue from the time it is completely filled up and issued, and not from the time the signature was given.<sup>3</sup>

#### ILLUSTRATIONS.

1. B., a bankrupt, gives a blank acceptance. It is filled up and negotiated after the close of the bankruptcy. The holder can sue, for it did not constitute a provable debt.<sup>4</sup>

NOTE.—An instrument which is wanting in some one or more of the requisites of a complete bill, is in effect a transferable authority to create a bill, and while incomplete is subject to the ordinary rules of law relating to authorities—*e. g.*, an authority emanating from a firm is not revoked by the death of a partner.<sup>5</sup> If the signer die while bill is incomplete, the authority, unless coupled with an interest, is revoked.<sup>6</sup>

#### *Inland and Foreign Bills.*

Inland bill defined.

Art. 24. Bills are either inland or foreign. An inland bill is a bill drawn and payable within the same country; all others are foreign bills.<sup>7</sup>

<sup>1</sup> *Chemung Bank v. Bradner* (1871), 44 N. Y. 680. *Contra, Hatch v. Searles* (1854) 2 Sm. & G. 147, at 153.

<sup>2</sup> *Aude v. Dixon* (1851), 6 Exch. 869; *Rez v. Hart* (1837), 1 Moo. C. C. 486. Cf. *Spitler v. James* (1869), 32 Ind. 202.

<sup>3</sup> *Temple v. Pullen* (1853), 8 Exch. 389; *Montague v. Perkins* (1853), 22 L. J. C. P. 187; *Ex parte Hayward* (1871), 6 L. R. Ch. 546. But maturity calculated from date, *Townsend v. France* (1861), 2 Houst. (Tenn.), 441.

<sup>4</sup> *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94.

<sup>5</sup> *Usher v. Dauncey* (1814), 4 Camp. 97.

<sup>6</sup> *Michigan Ins. Co. v. Leavenworth* (1856), 30 Vt. 11.

<sup>7</sup> *Freeman's Bank v. Perkins* (1841), 18 Me. 292; *Bank v. Daniel* (1838), 12 Pet. (U. S.) 32; *Amner v. Clark* (1835) 2 C. M. & R. 468; *Strauchbridge v. Robinson* (1849), 5 Gilm. (Ill.), 470. In England, defined by statute, British Code, § 4.

## ILLUSTRATION.

Inland bill  
defined.

A., B. and C. are residents of Augusta, Maine. A. draws a bill on B. payable to C. at the X. bank in Boston, Mass. This is a foreign bill.<sup>1</sup>

NOTE.—*Grimshaw v. Bender*<sup>1</sup> is the only case where it has been distinctly decided that the question depends on the residence of drawer and drawee, and the later cases in Massachusetts have followed it only in so far as to express the rule in the loose language of many cases where the residence of drawer and drawee were the same, so that no question could arise on this point.

*Explanation 1.*—The States of the Union are foreign to each other within the meaning of this article.<sup>2</sup>

*Explanation 2.*—Unless the contrary appear by its terms, the *prima facie* presumption is that a bill is an inland bill.<sup>3</sup>

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*Bill of Exchange Drawn in a Set.*

Art. 25. A Bill of Exchange may be drawn in a <sup>Whole set</sup> set, each part of the set being numbered, and contain-<sup>one bill.</sup> ing a reference to the other parts. All the parts constitute but one bill.<sup>4</sup>

## ILLUSTRATIONS.

1. If one part of a set omit reference to the rest it becomes a separate bill in the hands of a *bona fide* holder.<sup>5</sup>

2. An agreement to deliver up an unaccepted bill drawn in a set is an agreement to deliver up all the parts in existence.<sup>6</sup>

<sup>1</sup> *Freeman's Bank v. Perkins* (1841), 18 Me. 292; *Contra, Grimshaw v. Bender* (1809), 6 Mass. 162; *Bigelow*, p. 23.

<sup>2</sup> *Buckner v. Finley* (1829), 2 Pet. (U. S.), 586; *Ocean Bank v. Williams* (1869), 102 Mass. 41; *Mason v. Dousay* (1864), 35 Ill. 424; *Joseph v. Salomon* (1883), 19 Fla. 623.

<sup>3</sup> Cf. *Armani v. Castrique* (1844), 13 M. & W. 443; *Lennig v. Ralston* (1854), 23 Pa. St. at 139.

<sup>4</sup> Cf. French Code, Art. 110; *Societe Generale v. Bank* (1873), 27 L. T. N. S. 849; *Downes v. Church* (1839), 13 Pet. (U. S.) 205 at 207.

<sup>5</sup> German Exchange Law, Art. 66; Cf. French Code, Art. 147.

<sup>6</sup> *Kearney v. West Granada Co.* (1856), 26 L. J. Ex. 15. *Ratio decidendi* not clear. How could drawee of unaccepted bill be liable to the holder? He might be to the drawer ultimately.



Whole set  
one bill.

*Explanation.*—A person who negotiates a Bill of Exchange drawn in a set, is bound to deliver up all the parts in his possession, but by negotiating one part he does not warrant that he has the rest.<sup>1</sup>

NOTE.—In England the obligation to give a set is probably a matter of bargain. By German Exchange Law, Art. 66, the payee is entitled to demand a set from the drawer; and if a bill, issued singly, be destroyed or lost, the indorsee can obtain a second of exchange by addressing himself to his immediate indorser, who applies to the indorser before, and so on up to the drawer. French Law seems to be the same: *Nouguier*, § 205 and 219. The parts of a set (*duplicata*) must be distinguished from copies (*copie*): *Nouguier*, § 203; and German Exchange Law, Art. 70-72.

Indorsement  
of set.

Art. 27. A holder who negotiates a set by indorsement, may (and perhaps should) indorse all the parts that he holds.<sup>2</sup>

*Explanation.*—If an indorser indorses two parts to different persons, he is (probably) liable on both, and every indorser subsequent to him is liable on the part he has himself indorsed.<sup>3</sup>

NOTE.—The practice is for the indorser to indorse all the parts he holds. His position is analogous to that of the drawer. It is said an indorser is not bound to pay unless all the parts bearing his indorsement are given up to him or accounted for.<sup>4</sup> But in America it is held that in the case of an accepted bill, it is *prima facie* sufficient if the accepted part be given up,<sup>5</sup> and in the case of an unaccepted bill, if the protested part be given up; there being no presumption that the missing parts have been improperly negotiated.<sup>6</sup>

<sup>1</sup> *Pinard v. Klockman* (1863), 32 L. J. Q. B. 82.

<sup>2</sup> Cf. *Societe Generale v. Bank* (1873), 27 L. T. N. S. 849; *Nouguier*, § 218.

<sup>3</sup> *Id.* and *Holdsworth v. Hunter* (1830), 10 B. & C. 449; German Exchange Law, Art. 67; Cf. Indian Code, Art. 132.

<sup>4</sup> *Societe Generale v. Bank*, *supra* at 854.

<sup>5</sup> *Johnson v. Offutt* (1862), 4 Metc. (Ky.) 19; *Commercial Bank v. Routh* (1852), 7 La. An. 128.

<sup>6</sup> *Downes v. Church* (1839), 13 Pet. (U. S.), 205. But see *Wells v. Whitehead* (1836), 15 Wend. (N. Y.) 527; 3 Kent Com. 109.

Art. 28. The acceptance may be written on any <sup>Acceptance of set.</sup> part of a set, and it should be written on one only.<sup>1</sup>

NOTE.—Any part of the set may be presented for acceptance.<sup>2</sup>

Art. 29. Payment in due course of one part of a <sup>Payment of set.</sup> set discharges the whole bill.<sup>3</sup>

*Exception 1.*—If the drawee accepts two parts, and such parts get into the hands of different *bona fide* holders, he is (probably) liable to pay both.<sup>4</sup>

*Exception 2.*—If the acceptor pay without requiring the part bearing his acceptance to be delivered up to him, and such part be, at maturity, outstanding in the hands of a *bona fide* holder, he is (probably) not discharged.<sup>5</sup>

#### ILLUSTRATION.

B. accepts a third of exchange. At maturity the first and second are presented to him and he pays. It turns out that the third of exchange, with his acceptance on it, was at the time in the hands of a *bona fide* holder. B. is still liable to pay the third of exchange.

*Exception 3.*—The indorser who has indorsed two parts to different persons, and indorsers subsequent to him of the part not paid, are (probably) not discharged (Art. 27).

NOTE.—The exceptions as stated accord with mercantile opinion. Most foreign codes contain Exception 2. Art. 30, however, raises a difficulty.

<sup>1</sup> *Bank v. Neal* (1859), 22 How. (U. S.) 96; Cf. *Holdsworth v. Hunter* (1830), 10 B. & C. 449.

<sup>2</sup> *Id.*; *Walsh v. Blatchley* (1853); 6 Wis. 422.

<sup>3</sup> *Downes v. Church* (1839), 13 Pet. (U. S.) at 207; *Durkin v. Cranston* (1811), 7 Johns. (N. Y.) 442; French Code, Art. 147; German Exchange Law, Art. 57.

<sup>4</sup> *Bank v. Neal* (1859), 22 How. (U. S.) 96; Cf. *Holdsworth v. Hunter* (1830), 10 B. & C. 449; *Ralli v. Dennistoun* (1851), 6 Exch. at 496; German Exchange Law, Art. 67.

<sup>5</sup> Cf. French Code, Art. 148; German Exchange Law, Art. 67; and see *Kearney v. West Granada Co.* (1856), 1 H. & N. 412.

Right of  
holder of  
one part.

Art. 30. If the parts of a set be negotiated to different persons, the holder whose title first accrues is (perhaps) entitled to the whole set.<sup>1</sup>

ILLUSTRATION.

C., the holder of a bill drawn in a set, negotiates the third of exchange to D. Two days afterwards he negotiates the first and second to E. D. can compel E. to deliver up to him the first and second.<sup>2</sup>

NOTE.—This Art. is not necessarily inconsistent with Arts. 27 and 29, where the liability of the acceptor or indorser depends on estoppel and is independent of title to the bill. In the case given, E. would not be without remedy. He could get back from C. the money he had given for the bill as money paid for a consideration which had failed, or he could bring an action against C. for false representation.

*Acceptance of Bill of Exchange.*

Acceptance  
defined.

Art. 31. "Acceptance" is the assent in due form by the drawee of a Bill of Exchange to the order of the drawer.

Requisites  
in form.

Art. 32. The acceptance<sup>3</sup> of a Bill of Exchange may be:

(1.) In writing on the bill,<sup>4</sup> or on a separate paper.<sup>5</sup>

ILLUSTRATIONS.

1. A. draws a bill on B. B. writes thereon the word "Ac-

<sup>1</sup> *Perreira v. Jopp* (1793), cited 10 B. & C. at 450, see at 454; Cf. *Walsh v. Blatchley* (1853), 6 Wis. 422.

<sup>2</sup> *Id.*

<sup>3</sup> Completed by delivery, or notification to the holder. *Smith v. McClure* (1804), 5 East, 476; *Dunavan v. Flynn* (1875), 118 Mass. 537; Cf. Art. 53.

<sup>4</sup> Must be in England (British Code, § 17 (2), and by statute in many of the States.

<sup>5</sup> *Jones v. Bank* (1864), 34 Ill. 313; *Wynne v. Raikes* (1804), 2 J. P. Smith, 98.

cepted," "Presented," "Seen," "Honored," or merely his <sup>Request in form.</sup> name. This is *prima facie* an acceptance.<sup>1</sup>

2. B. writes on the back thereof, "I will see the within paid eventually." This is an acceptance.<sup>2</sup>

3. B. writes thereon an order to X. to pay the within. This is an acceptance.<sup>3</sup>

4. B. writes thereon, "I take notice of the above," and signs his name. This is not *necessarily* an acceptance.<sup>4</sup>

5. A. draws a bill on B. After it is received by C., the payee, B. writes to A., promising to *pay* the bill. This is an acceptance, and enures to the benefit of C., and all subsequent holders.<sup>5</sup>

NOTE.—The drawee may use any form of words from which the intention to accept can be gathered,<sup>6</sup> and if the words necessarily import an acceptance, he will be bound thereby, whether he intended to accept or not. But if the language is ambiguous, parol evidence to explain it is admissible between immediate parties, perhaps against a remote party.<sup>7</sup>

## (2) Oral,<sup>8</sup> or implied from acts of the drawee.<sup>9</sup>

### ILLUSTRATIONS.

1. A. draws a bill on B. When presented by the holder for acceptance, B. refuses to write anything on the bill, but says, "The bill is correct and shall be paid." This is an acceptance.<sup>10</sup>

<sup>1</sup> *Spear v. Pratt* (1842) 2 Hill, (N. Y.), 582; *Kaufman v. Barringer* (1868), 20 La. An. 419. S., indorsing "payment guaranteed," *Block v. Wilkerson* (1833), 42 Ark. 253.

<sup>2</sup> *Brunnin v. Henderson* (1851), 12 B. Mon. (Ky.) 61.

<sup>3</sup> *Harper v. West* (1804), 1 Cranch. (C. Ct.) 192.

<sup>4</sup> *Cook v. Baldwin* (1876), 120 Mass. 317. Cf. *Smith v. Milton* (1882), 133 Mass. 369.

<sup>5</sup> Cf. *Edson v. Fuller* (1850), 2 Fost. (N. H.) 183 at 188; *Jones v. Bank* (1864), 34 Ill. 313; *Spaulding v. Andrews* (1864), 48 Pa. St. at 413; *Wynne v. Raikes* (1804), 2 East, 514; *Fairlee v. Herring* (1826), 3 Bing. 625, Burrough, J., & Best, C. J. Cf. *infra*, Expl. 3.

<sup>6</sup> Cf. *Smith v. Virtue* (1860), 30 L. J. (C. P.) at 60, Byles, J.

<sup>7</sup> *Gallagher v. Black* (1857), 44 Me. 99; *Bigelow*, p. 49.

<sup>8</sup> *Scudder v. Bank* (1875), 91 U. S. 406; *Pierce v. Kittredge* (1874), 115 Mass. 374; *Sturges v. Bank* (1874), 75 Ill. 595; *Miller v. Neihaus* (1875), 51 Ind. 401; *Duel v. Bricker* (1874), 76 Pa. St. 255, *Jarris v. Wilson* (1878), 46 Conn. 90. *Contra*, unless drawee then has funds of drawer in hand, *Walton v. Manderille*, 56 Ia. 597.

<sup>9</sup> Cf. *Cook v. Baldwin*, *supra*; *McCutchen v. Rice* (1879), 56 Miss. 455.

<sup>10</sup> *Ward v. Allen* (1840), 2 Met. (Mass.) 53, and *Spaulding v. Andrews*, (1864), 48 Pa. St. 411.

Requisites  
in form.

2. If drawee in possession of the bill procures *another* to discount it, an acceptance is implied.<sup>1</sup>

3. Detention of the bill by drawee, may, under some circumstances, amount to an acceptance.<sup>2</sup>

3. Part payment of the bill by drawee, will not, of itself, amount to an acceptance.<sup>3</sup>

NOTE.—In case of a written acceptance on the bill, it is immaterial by whom presented, but in case of an oral acceptance or a written acceptance *dehors* the bill, it must be addressed to a party to the bill; if to a mere stranger, it is not an acceptance.<sup>4</sup>

(3.) A written or verbal<sup>5</sup> promise to accept, either before,<sup>6</sup> or after the existence of the bill.<sup>7</sup>

*Explanation 1.*—Such promise must be made within a reasonable time before or after the issue of the bill.<sup>8</sup>

#### ILLUSTRATION.

A. and B. having an open account, an adjustment takes place between B. and an agent of A., and the balance found due is paid over to the agent. A. expresses dissatisfaction, whereupon B. writes him, "Re-peruse the accounts, make out a statement to suit yourself, and draw on me for the balance, which shall be duly honored." B. is not thereby liable as acceptor on a bill drawn two years afterwards.<sup>9</sup>

<sup>1</sup> *Bank v. Marsden* (1861), 34 Vt. 89. *Aliter*, if discounted by drawee. *Swope v. Ross* (1861), 40 Pa. St. 186.

<sup>2</sup> *Hough v. Loring* (1837), 24 Pick. (Mass.) 254; *Hall v. Steel* (1873), 68 Ill. 231; Cf. *Oreman v. Bank* (1864), N. J. L. 563.

<sup>3</sup> *Cook v. Baldwin* (1876), 120 Mass. 317; *Bassett v. Haines* (1858), 9 Cal. 260; Cf. *Peterson v. Hubbard* (1873), 28 Mich. 197.

<sup>4</sup> *Martin v. Bacon*, Treadw. (S. C.) Const. 133; *Story*, § 247.

<sup>5</sup> *Nelson v. Bank* (1868), 48 Ill. 37; *Scudder v. Bank* (1875), 91 U. S. 406; Cf. *Bank v. Ely* (1837), 17 Wend. (N. Y.) 508. *Contra*, if before bill drawn, *Kennedy v. Geddes* (1838), 8 Port. (Ala.) 263; *Plummer v. Lyman* (1860), 49 Me. 229.

<sup>6</sup> *Contra*, *Johnson v. Collings* (1800), 1 East, 98; *Bank v. Archer* (1843), 11 M. & W. 383.

<sup>7</sup> *Coolidge v. Payson* (1817), 2 Wheat. (U. S.) 66; *Parker v. Greele* (1829), 2 Wend. (N. Y.) 545; *Merchants Bank v. Griswold* (1878), 72 N. Y. 472; *Ruiz v. Renauld* (1885), 100 N. Y. 256.

<sup>8</sup> *Id.*; *Boyce v. Edwards* (1830), 4 Pet. (U. S.) 111.

<sup>9</sup> *Wilson v. Clements* (1807), 3 Mass. 1.

*Explanation 2.*—Such promise must specify the bill <sup>Requisites in form.</sup> to be drawn, so as to distinguish it from any other.<sup>1</sup>

## ILLUSTRATIONS.

1. B. telegraphs to A., "I have no objections to accepting for you at 3 or 4 months for \$2,500." B. may be liable as acceptor on bill for \$2,500 at 4 months, drawn in pursuance of the authority.<sup>2</sup>

2. B. writes to A., "I authorize you to draw on me at ninety days from time to time, for such amounts as you may require, whole amount not to exceed \$3,000." B. may be liable on a bill drawn in pursuance of the authority given.<sup>3</sup>

*Explanation 3.*—The bill must be taken by the holder on the faith of such promise.<sup>4</sup>

## ILLUSTRATIONS.

1. A. draws a bill on B. After it is received by C., B. writes to A. that he will *accept* the draft, and the letter is shown to C. C. cannot hold B. as acceptor.<sup>5</sup> *Aliter*, if before C. receives the bill, A. either shows him the letter or informs him of its contents.<sup>6</sup>

2. B. promises C. to accept a bill to be drawn by A. in his favor. D. discounts the bill so drawn, on the faith of B.'s promise to C. to accept. B. subsequently refuses to accept. D. cannot hold B. as acceptor, since a promise to accept is a chose in action and not assignable.<sup>7</sup>

<sup>1</sup> *Nelson v. Bank* (1868), 48 Ill. 36; *Bissell v. Lewis* (1857), 4 Mich. 450; *Carnegie v. Morrison* (1841), 2 Met. (Mass.) 381 at 406.

<sup>2</sup> *Parker v. Greele*, (1829), 2 Wend. (N. Y.) 545; and *Central Bank v. Richards* (1872), 109 Mass. 413; Cf. *Coffman v. Campbell* (1877), 87 Ill. 98.

<sup>3</sup> *Ulster Bank v. McFarland* (1845), 5 Hill (N. Y.), 432, S. C., 3 Den. 553; Cf. *Barney v. Newcomb* (1831), 9 Cush. 46. But see *Boyce v. Edwards*, (1830), 4 Pet. (U. S.) 111.

<sup>4</sup> *Coolidge v. Payson* (1817), 2 Wheat. (U. S.) 66; *Pillans v. Van Mierop* (1765), 3 Burr. 1663; *Exchange Bank v. Rice* (1867), 98 Mass. 288; *First Nat. Bank v. Pettit* (1866), 41 Ill. 492; *Steman v. Harrison* (1862), 42 Pa. St. 49. *Contra*, *Read v. Marsh* (1844), 5 B. Mon. (Ky.) 8; Cf. *Grant v. Hunt* (1845), 1 C. B. 44.

<sup>5</sup> *Exchange Bank v. Rice* (1867), 98 Mass. 288; *Worcester Bank v. Wells* (1844), 8 Met. (Mass.) 107; *Ontario Bank v. Worthington* (1834), 12 Wend. (N. Y.) 593. Cf. (1), Illustr. 5, *supra*, promise to pay.

<sup>6</sup> *Bank v. Ely* (1837), 17 Wend. (N. Y.) 508; *Fairchild v. Feltman* (1884), 32 Hun (N. Y.), 398; *Lewis v. Kramer* (1852), 3 Md. at 289.

<sup>7</sup> *Worcester Bank v. Wells*, *supra*; *M'Evers v. Mason* (1813), 10 Johns. (N. Y.) 207; *Carr v. Bank* (1871), 107 Mass. 45 at 48.

Requisites  
in form.

NOTE.—Is there any distinction between B.'s promise to the drawer to accept, and his promise to pay, an existing bill? Many of the cases seem to regard them as the same, and governed by like rules, though a careful examination of the cases will show that no Court has decided that a promise to *pay* an existing bill was not an acceptance.<sup>1</sup> When B. accepts he thereby promises to pay the bill; therefore, when he promises to pay, he thereby, in effect, accepts the bill, and does not merely agree to accept. On what other ground can the cases cited below be reconciled?<sup>2</sup>

Undated  
acceptance.

Art. 33. An acceptance need not be dated.

*Explanation.*—In the case of a Bill of Exchange payable after sight, the acceptance should be dated, but extrinsic evidence is admissible to show on what date an undated acceptance was given.<sup>3</sup>

NOTE.—French Code, Art. 122, provides, that if a bill be payable after sight and the acceptance be not dated, time runs from the date of the bill; but see *Nouguier*, § 498.

Time of  
acceptance.

Art. 34. A Bill of Exchange may be accepted—

(1.) Before it has been signed by the drawer, or while otherwise incomplete.<sup>4</sup>

(2.) After it is overdue.<sup>5</sup>

(3.) After it has been dishonored by a previous refusal to accept, or by non-payment, followed by protest.<sup>6</sup>

<sup>1</sup> Cf. *Lugrue v. Woodruff* (1860), 29 Ga. 648; *Oberman v. Bank* (1862), 30 N. J. L. at 68; *Carr v. Bank* (1871), 107 Mass. 45.

<sup>2</sup> Cf. *Jones v. Bank* (1864), 34 Ill. 313, with *First Nat. Bank v. Pettit* (1866), 41 Ill. 492, and *Nelson v. Bank* (1868), 48 Ill. 36. Cf. *Spaulding v. Andrews* (1864), 48 Pa. St. at 413, with *Steman v. Harrison* (1862), 42 Pa. St. 49, and *Howland v. Carson* (1850), 15 Pa. St. 453. See *Edson v. Fuller* (1850), 2 Fost. (N. H.) 183.

<sup>3</sup> *Kenner v. Creditors* (1830), 1 La. (O. S.) 120; and Cf. Arts. 15 and 158, n.

<sup>4</sup> *London & Southwestern Bank v. Wentworth* (1880), 5 Ex. D. 96; *Harvey v. Cane* (1876), 34 L. T. N. S. 64; and Art. 23.

<sup>5</sup> *Spaulding v. Andrews* (1864), 48 Pa. St. at 413; *Williams v. Winans* (1834), 2 Green (N. J.), 339.

<sup>6</sup> *Stockwell v. Bramble* (1852), 3 Ind. 428; Cf. *Christie v. Peart* (1841), 7 M. & W. 491, and Art. 157.

## ILLUSTRATIONS.

Time of  
acceptance.

1. A. draws a bill on B., dated January 1, payable one month after date. C., the holder, presents it for acceptance in March. B. accepts. As regards B., this is a valid acceptance of a bill payable on demand.<sup>1</sup>

2. The holder of a bill payable one month after sight presents it to the drawee for acceptance. Acceptance is refused. A week after it is re-presented, and accepted. The acceptance is valid.<sup>2</sup>

NOTE.—When a bill payable after sight is refused acceptance, and then subsequently accepted, the now uniform practice is to ante-date the acceptance to the day the bill was first presented.<sup>3</sup>

Art. 35. Unless the contrary appear, a Bill of Exchange is *prima facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance.<sup>4</sup>

Presumption  
as to time  
of date of ac-  
ceptance.

## ILLUSTRATION.

B. accepts, without dating, a bill drawn payable three months after date. He attains his majority the day before the bill matures. This is *prima facie* evidence that B. accepted it while an infant.<sup>5</sup>

Art. 36. An acceptance must not express that the acceptor will perform his contract by any other means than the payment of money.<sup>6</sup>

Acceptance  
must be to  
pay money.

## ILLUSTRATION.

'A. draws a bill on B. for \$100. B. accepts it, "payable in goods." This is invalid.<sup>7</sup>

<sup>1</sup> *Mutford v. Walcot* (1698), 1 Ld. Raym. 514; Cf. Art. 201, n.

<sup>2</sup> *Wynne v. Raikes* (1804), 5 East, 514; Cf. *Grant v. Shaw* (1820), 16 Mass. 341.

<sup>3</sup> But Cf. *Mitchell v. Degrand* (1817), 1 Mason (C. Ct.), 176.

<sup>4</sup> *Roberts v. Bethell* (1852), 12 C. B. 778; *Mason v. Dousay* (1864), 35 Ill. at 433; Cf. Art. 132.

<sup>5</sup> *Id.*

<sup>6</sup> *Russell v. Phillips* (1850), 14 Q. B. 891; Cf. Art. 10, Expl. 3.

<sup>7</sup> *Id.*; Cf. *Boehm v. Garcias* (1807), 1 Camp. 425.



Acceptance  
must be to  
pay money.

NOTE.—When the time of payment comes, the holder may, of course, accept goods in satisfaction of the debt due to him.

Drawee only  
can accept.

Art. 37. The acceptance of a Bill of Exchange by any person other than the drawee is invalid.

*Exception.*—Acceptance for honor. (Art. 42.)

#### ILLUSTRATIONS.

1. Bill addressed to B. X. writes an acceptance on it. X. is not liable as acceptor.<sup>1</sup>

2. Bill addressed to B. B. accepts it. X. also writes an acceptance on it. X. is not liable as acceptor;<sup>2</sup> and parol evidence is not admissible to show that he guaranteed payment of the bill to the drawer.<sup>3</sup>

3. Bill addressed to the "Directors of the B. Company." The acceptance is signed by two directors and the manager. The manager is not liable as acceptor.<sup>4</sup>

NOTE.—If a person other than drawee write an acceptance on the bill, his liability will be determined by the same rules as in the case of irregular indorsements.<sup>5</sup> See Art. 111, n.

Can a Case of need accept otherwise than *supra protest*? On the Continent he cannot. Byles and Parsons seem to think that under English law he may; but see Chitty on Bills, 10th ed. 114. The uniform practice is for him to accept *supra protest*.

*Explanation 1.*—When a Bill of Exchange is addressed to two or more drawees, whether partners or not, any one of them may accept so as to bind himself.<sup>6</sup>

#### ILLUSTRATIONS.

1. A bill is addressed to B. & Co. X., a partner in that firm, accepts it in his own name. He may be liable as acceptor.<sup>7</sup>

<sup>1</sup> *Davis v. Clarke* (1844), 6 Q. B. 16; *May v. Kelly* (1855), 27 Ala. 497.

<sup>2</sup> *Jackson v. Hudson* (1810), 2 Camp. 447; *Smith v. Lockridge* (1871), 8 Bush. (Ky.). 424.

<sup>3</sup> *Steele v. McKinlay* (1880), 5 App. Cases, 754.

<sup>4</sup> *Bult v. Morrell* (1840), 12 A. & E. 745.

<sup>5</sup> *Walton v. Williams* (1870), 44 Ala. 347.

<sup>6</sup> *Owen v. Von Ulster* (1850), 10 C. B. 318; *Heenan v. Nash* (1863), 8 Minn. at 411.

<sup>7</sup> *Id.*; *Tombeckbee Bank v. Dumell* (1828), 5 Mason (C. Ct.), 16; Cf. *Cunningham v. Smithson* (1841), 12 Leigh (Va.), 32. *Contra*, *Heenan v. Nash* (1863), 8 Minn. 407.

2. A bill is addressed to B. and X. B. alone accepts. He is liable as acceptor.<sup>1</sup> Drawee only  
can accept.

NOTE.—If a bill is addressed to a firm, an acceptance by a partner in his individual name may bind the firm,<sup>2</sup> in the absence of statute requiring an acceptance to be signed by the acceptor.<sup>3</sup>

*Explanation 2.*—A Bill of Exchange may (probably) be accepted by the drawee in any name he chooses to adopt.<sup>4</sup>

#### ILLUSTRATIONS.

1. A bill is addressed to B. His wife accepts it, signing her name "Mary B." B. promises to pay the bill. He is liable as acceptor.<sup>5</sup>

2. Bill addressed to B., who is a partner in the firm of X. & Co. B. accepts it in the firm name. B. is liable personally as acceptor.<sup>6</sup>

NOTE.—It is to be noted that *Lindus v. Bradwell*<sup>4</sup> was decided before the Acts which required an acceptance to be signed by the acceptor, but the Court seems to rest its decision on the ground that, though a bill must be accepted by the drawee, he may accept in any name he chooses to adopt, and that, in this case, William B. chose to adopt *pro hac vice* the name of his wife to accept in.

*Explanation 3.*—In construing an acceptance, the address to the drawee and the acceptance must be read together.

#### ILLUSTRATIONS.

1. A bill is addressed to the B. Company, Limited. Two of the directors accept it, signing thus: "X. & Y., directors of

<sup>1</sup> *Owen v. Von Uster* (1850), 10 C. B. 318.

<sup>2</sup> *Mason v. Rumsey* (1808), 1 Camp. 304; *Tolman v. Hanrahan* (1878), 44 Wis. 133.

<sup>3</sup> *Heenan v. Nash* (1863), 8 Minn. 407. But Cf. *Yorkshire Banking Co. v. Beatson* (1879), 4 L. R. C. P. D. 204.

<sup>4</sup> *Lindus v. Bradwell* (1848), 5 C. B. at 591; *Ala. C. M. Co. v. Brainard* (1860), 35 Ala. 476; Cf. Art. 71, Expl. 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Nicholls v. Diamond* (1853), 9 Exch. 154; Cf. Art. 72, Expl. 3. *Contra, Markham v. Hazen* (1873), 48 Ga. 570.

Drawee only  
can accept.

the B. Co., Limited." This is an acceptance by the company.<sup>1</sup>

2. A bill is addressed to "B., general agent of the X. Company." He accepts it thus: "Accepted on behalf of the Company—B." B. is personally liable as acceptor.<sup>2</sup>

3. A bill is addressed to B. & Co. B., a partner in the firm, accepts it in the firm's name, adding also his own name. This is the acceptance of the firm, and not of B. personally.<sup>3</sup>

4. A bill is addressed to "X. & Co." The proper style of the firm is "B., X. & Co.," and it is accepted in that name. This is a valid acceptance.<sup>4</sup>

5. B. accepts a bill blank as to drawee. This is an admission that he was the person intended, and he is liable as acceptor.<sup>5</sup>

NOTE.—In the case of signatures by agents, there is this distinction between a bill and a note. A bill can only be accepted by the drawee; so either the drawee is liable as acceptor, or no one is liable, and the rule of construction is *ut res magis valeat quam pereat*. When the point arises on a note, the only question is whose is the signature—is it the signature of the principal or of the agent?<sup>6</sup>

General  
or absolute  
acceptance.

Art. 38. An acceptance may be—(a), General, or—(b), Qualified.<sup>7</sup> A General or Absolute acceptance assents without qualification to the order of the drawer. The form of words used is immaterial.<sup>8</sup>

NOTE.—The holder of a bill is entitled to an absolute acceptance: Art. 158; Cf. Art. 58, as to construction.

Qualified  
acceptance.

Art. 39. A Qualified acceptance varies the effect of the bill as drawn; therefore an acceptance is qualified which is,

<sup>1</sup> *Okell v. Charles* (1876), 34 L. T. N. S. 892, C. A.

<sup>2</sup> *Herald v. Connah* (1876), 34 L. T. N. S. 855; *Mare v. Charles* (1856), 5 E. & B. 978. *Contra*, *Markham v. Hazen* (1873), 48 Ga. 570.

<sup>3</sup> *Re Barnard* (1886), 32 Ch. D. 447, C. A.

<sup>4</sup> *Lloyd v. Ashby* (1831), 2 B. & Ad. 23.

<sup>5</sup> *Wheeler v. Webster* (1850), E. D. Sm. (N. Y.), 1.

<sup>6</sup> Cf. *Alexander v. Sizer* (1869), 4 L. R. Ex. at 105.

<sup>7</sup> *Rowe v. Young* (1820), 2 Bligh, 391 H. L.; *Hough v. Loring* (1837), 24 Pick. (Mass.) 254.

<sup>8</sup> *Id.* at 454.

(1.) Conditional—*i. e.*, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.

## ILLUSTRATIONS.

1. The drawee of a bill accepts it. "Accepted—payable on giving up bills of lading for clover, per ship 'Amazon.'"<sup>1</sup>
2. Or, "Accepted—payable when in funds."<sup>2</sup>

NOTE.—The condition as between immediate parties, may be written on a separate instrument, though absolute on the bill.<sup>3</sup>

(2.) Partial, or restricted as to amount.

## ILLUSTRATIONS.

1. A. draws a bill on B. for \$100. B. accepts it as to \$50.<sup>4</sup>
2. A. draws a bill on B. for \$100. B. accepts it, payable half in money, half in goods. This is valid as a qualified acceptance for \$50.<sup>5</sup>

(3.) Local, or restricted as to place of payment.

## ILLUSTRATIONS.

1. Bill addressed to "B. of N. Y. City," is accepted payable at Albany, N. Y. This is a qualified acceptance.<sup>6</sup>
2. Bill addressed to "B. of N. Y. City," is accepted payable at the X. Bank, N. Y. City. This is a general acceptance.<sup>7</sup>

NOTE.—As to the effect of *drawing* a bill payable at a particular place, see Art. 172.

(4.) Qualified as to time.

<sup>1</sup> *Smith v. Virtue* (1860), 30 L. J. C. P. 56; Cf. *Swan v. Cox* (1814), 1 Marsh. 170; *Re Howe* (1871), 6 L. R. Ch. 838; *Lamon v. French* (1869), 25 Wis. 37.

<sup>2</sup> *Id.*; *Juſſian v. Sherbrooke* (1754), 2 Wils. 9; *Wintermute v. Post* (1854), 4 Zab. (N. J.) at 423; *Pope v. Heath* (1859), 14 Cal. 403; *Crowell v. Plant* (1873), 53 Mo. 145. *Aliter*, if drawn payable "if in funds," *Kemble v. Lull* (1843), 8 McL. (C. Ct.), 272.

<sup>3</sup> *Ford v. Angelrodt* (1865), 37 Mo. 50.

<sup>4</sup> Cf. *Wegersloff v. Keene* (1709), 1 Stra. 214.

<sup>5</sup> *Petit v. Benson* (1697), Comb. 452; Cf. *Rowe v. Young* (1820), 2 Bligh at 409, H. L.

<sup>6</sup> *Walker v. Bank* (1852), 13 Barb. (N. Y.) 636.

<sup>7</sup> *Troy Bank v. Lauman* (1859), 19 N. Y. 477; *Myers v. Standart* (1860), 11 O. St. 29.

Qualified  
acceptance.

## ILLUSTRATIONS.

1. A. draws a bill on B., payable two months after date. B. accepts it, payable six months after date.<sup>1</sup>
2. A. draws a bill on B., payable at sight. B. accepts it "payable in fifteen days."<sup>2</sup>
3. B. accepts a bill drawn on him, "on condition that it be renewed," for six months.<sup>3</sup>

(5.) The acceptance of some one or more joint drawees, but not of all.

## ILLUSTRATION.

Bill drawn on B., X. and Y. B. accepts. X. and Y. refuse to accept. This is a qualified acceptance.<sup>4</sup>

NOTE.—German Exchange Law, Art. 22, admits a partial acceptance, but makes any other qualification a refusal to accept. French Code, Art. 124, prohibits a conditional, but admits a partial acceptance, directing the holder to protest the bill as to the residue. England and the United States seem to be the only countries that allow of conditional acceptance. Cf. Art. 10; and Art. 271.

Effect of qualified acceptance.

Art. 40. A Qualified acceptance is valid as regards the acceptor and all subsequent parties, and as regards prior parties who assent thereto. A prior party (drawer or indorser) who does not authorize or assent to it is (probably) discharged.<sup>5</sup>

NOTE.—In *Rowe v. Young*,<sup>6</sup> the judges differed in opinion as to the effect of taking a qualified acceptance without the consent or subsequent assent of prior parties, some thinking that prior parties would only be discharged if it could be shown that their rights were injuriously affected, others think-

<sup>1</sup> *Russell v. Phillips* (1850), 14 Q. B. 891; Cf. *Fanshawe v. Peat* (1857), 26 L. J. Ex. 814.

<sup>2</sup> *Hatcher v. Stalworth* (1853), 25 Miss. 376.

<sup>3</sup> *Russell v. Phillips*, *supra*.

<sup>4</sup> *Byles*, p. 186, citing *Marius*, No. 16; N. Y. Civil Code, (Draft of 1888), § 2832; *Nouguier*, § 451.

<sup>5</sup> *Rowe v. Young* (1820), 2 Bligh, 891, H. L., third question to judges and answers thereto. Cf. *Whitehead v. Walker* (1842), 9 M. & W. at 509; *Walker v. Bank* (1852), 13 Barb. (N. Y.) 636.

ing that they would be *ipso facto* discharged. See by way of analogy Arts. 248, 249 on Alterations. Suppose the holder takes a qualified acceptance. All admit that he must give notice to the drawer. If the drawer, on receipt of the notice, assent, or, perhaps, do not express his dissent, well and good. But is he not entitled to say, "You have altered my contract behind my back, I am no longer a party to it? *Non hæc in fœdera veni*. If the drawee do not in terms assent to my order I am entitled to notice of dishonor, and notice of dishonor includes a demand of payment. This you cannot give." Can the holder reply, "The drawee is to some extent your agent, and the altered contract was entered into for your benefit?" Surely not.

### *Acceptance for Honor supra Protest.*

Art. 41. A Bill of Exchange may be accepted for <sup>What bills.</sup> honor *supra protest*, which has been—

- (1.) Dishonored by non-acceptance;<sup>1</sup> or
- (2.) Protested for better security after acceptance.

Art. 42. Any person, not being a party already liable thereon, may, with the consent of the holder,<sup>2</sup> <sup>Who may accept for honor.</sup> intervene and accept such bill after protest, for the honor of the drawer or an indorser.<sup>4</sup>

### ILLUSTRATION.

Bill dishonored by non-acceptance. The drawee, or a stranger to the bill, may accept it for the honor of the drawer or an indorser.<sup>5</sup>

NOTE.—But if the drawee is under obligation to accept, he can not acquire any different rights by accepting *supra protest*.<sup>6</sup> This kind of acceptance is not common in America. In France and Germany the rule is that if two or more persons are willing to accept *supra protest*, the holder must take the acceptance of the person whose payment will enure for the

<sup>1</sup> *Mutford v. Walcot* (1693), 1 Ld. Raym. 575; French Code, Art. 126; German Exchange Law, Art. 56.

<sup>2</sup> *Ex parte Wackerbath* (1800), 5 Ves. Jr. 574; Cf. Art. 183.

<sup>3</sup> *Bytes*, p. 266; *Chitty*, pp. 243, 244; *Story*; *Beawes*, No. 37.

<sup>4</sup> *Hoare v. Cazenove* (1812), 16 East, 391; *Desha v. Stewart* (1844), 6 Ala. 852; French Code, Art. 125; German Exchange Law, Arts. 56-61.

<sup>5</sup> *Swope v. Ross* (1861), 40 Pa. St. 186; *Beawes*, No. 32; *Nouguier*, § 574.

<sup>6</sup> *Schimmelpennich v. Bayard* (1828), 1 Pet. (U. S.) 264.

Who may  
accept for  
honor.

benefit of most parties.<sup>1</sup> Beawes, No. 42, says that if a bill be accepted for the honor of an indorser, there may be another acceptance *supra protest* for the honor of any party prior to him. This is not resorted to in practice; but if the acceptor *supra protest* fails before the maturity of the bill, a second acceptance *supra protest* is sometimes obtained.

Holder's option.

Art. 43. It is optional with the holder to take or refuse an acceptance *supra protest*.<sup>2</sup>

*Exception.*—When the drawer of a foreign bill gives a reference to a Case of need, and by the law of the place where such bill is drawn presentment to the Case of need is obligatory, the holder (perhaps) can not refuse to take the acceptance *supra protest* of such Case of need.<sup>3</sup>

NOTE.—By German Exchange Law, Art. 57, if the bill contain a reference to a Case of need, the holder is bound to present the bill to him; in other cases he may refuse acceptance *supra protest*. Under French Code, Art. 126, the holder, perhaps, can not in any case refuse.

Time of acceptance for honor.

Art. 44. An acceptance *supra protest* may be given at any time after the bill has been protested and before it is over-due.

*Explanation.*—A bill noted for protest is deemed to be protested.<sup>4</sup>

#### ILLUSTRATION.

Bill payable one month after sight is protested for non-acceptance. It may be accepted *supra protest* eight days afterwards.<sup>5</sup>

NOTE.—In France, perhaps, the acceptance for honor must be given at the time the bill is protested: *Nouguier*, § 570.

<sup>1</sup> *Nouguier*, § 575; German Exchange Law, Art. 56.

<sup>2</sup> *Byles*, p. 266; *Chitty*, pp. 243, 244; *Story*, § 122; *Beawes*, No. 37. Cases cited by these authors do not seem in point.

<sup>3</sup> Cf. Art. 184.

<sup>4</sup> *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105.

<sup>5</sup> Cf. *Williams v. Germaine* (1827), 7 B. & C. 468.

Art. 45. An acceptance *supra protest* must be in writing on the bill, signed by the acceptor, and duly attested by a notarial act of honor.<sup>1</sup> Form of acceptance for honor.

## ILLUSTRATION.

The acceptor for honor writes on the bill, "Accepted *supra protest* for the honor of C., and will be paid at my office if regularly presented when due;" or, "Accepted under protest for the honor of A., and will be paid for his account if refused when due and regularly protested."<sup>2</sup> Or simply, "Accepted, S. P." He then signs.

NOTE.—By German Exchange Law, Art. 58, the acceptance *supra protest* is to be recorded in an appendix to the protest. By French Code, Art. 126, the acceptance *supra protest* must be recorded in the protest, and the protest signed by the acceptor: Cf. "*Nouguier*, § 570." In England the notarial act, in this case called an "act of honor," is appended to the protest. A "notarial act" means "any instrument, indorsement, note, or entry made or signed by a notary public in the execution of the duties of his office."<sup>3</sup> It was formerly the practice for the acceptor *supra protest* to appear personally before the notary with witnesses, to declare for whose honor he accepted. Modern custom no longer requires this.<sup>4</sup> A clerk is usually sent to the notary.

Art. 46. There may be an acceptance *supra protest* for part of the amount of the bill.<sup>5</sup> Partial acceptance for honor.

Art. 47. An acceptance *supra protest* should state for whose honor it is given. If it do not, it is deemed to be given for the honor of the drawer.<sup>6</sup> Presumption.

Art. 48. An acceptance *supra protest* (probably) suspends until non-payment the holder's right of action, which arises on non-acceptance.<sup>7</sup> Effect of acceptance for honor.

<sup>1</sup> Cf. *Gazzam v. Armstrong* (1835), 3 Dana (Ky.), 554; *Byles*, p. 265; *Chitty*, p. 244; *Story*; *Brooks' Notary*, 4 ed., p. 93.

<sup>2</sup> Cf. *Mitchell v. Baring* (1829), 10 B. & C. 4; *Howland v. Carson* (1850), 15 Pa. St. 453.

<sup>3</sup> Indian Stamp Act, 1870, § 3.

<sup>4</sup> *Brooks' Notary*, 4 ed. p. 94.

<sup>5</sup> *Id.* p. 97.

<sup>6</sup> *Gazzam v. Armstrong supra*; *Chitty*, p. 243; *Daniel*, § 525; German Exchange Law, Art. 59; *Nouguier*, § 578.

<sup>7</sup> Cf. *Williams v. Germaine* (1827), 7 B. & C. at 477; *Chitty*, p. 238.



Effect of  
acceptance  
for honor.

NOTE.—Query, if in some cases the right of action be not taken away and not merely suspended, but the point has not been judicially discussed. On payment *supra protest*, or dishonor at maturity, new rights and obligations arise: Cf. Art. 244. By French Code, Art. 128, the holder's rights against the drawer and indorsers are not affected by an acceptance *supra protest*; but then the holder has no right of action until the maturity of the bill: he can only demand security: Cf. Art. 157. By German Exchange Law, Art. 61, the holder is entitled to demand security from parties prior to the party for whose honor the acceptance is given.

### Signature.

Sufficiency  
in form.

Art. 49. "Signature" means the writing of a person's name on a bill, in order to authenticate and give effect to some contract thereon. (Cf. Art. 52.)

*Explanation.*—A signature sufficient in point of form in the case of an ordinary contract is (perhaps) sufficient in the case of a bill.

### ILLUSTRATIONS.

1. A signature in pencil is sufficient.<sup>1</sup>
2. A lithographed signature, or a signature impressed with a stamp, is (perhaps) sufficient.<sup>2</sup>
3. A note in the form, "I, J. B., promise *et cel.*," is sufficiently signed, though the usual form is, "I promise, *et cel.*," signed J. B.<sup>3</sup>
4. Bill drawn in the form, "Mr. A. requests Messrs. B. & Co., *et cel.*." This is (probably) a sufficient signature by the drawer.<sup>4</sup>
5. A bill under seal, without signature, is not sufficiently signed, unless the contrary be provided by statute.<sup>5</sup>

<sup>1</sup> *Geary v. Physic* (1826), 5 B. & C. 234; *Reed v. Roark* (1855), 14 Tex. 329.

<sup>2</sup> Cf. *Ex parte Birmingham Banking Co.* (1863), 3 L. R. Ch. at 653, 654.

<sup>3</sup> *Taylor v. Dobbin* (1719), 1 Stra. 399.

<sup>4</sup> Cf. *Ruff v. Webb* (1794), 1 Esp. 129. As to documents other than bills, *Caton v. Caton* (1867), 2 L. R. H. L. at 143.

<sup>5</sup> *Byles*, p. 68; *Story*, § 61; Cf. Art. 278. Note of co-operation. As to kind of bond formerly known as a "single bill" or "bill under seal," and sometimes confused with a bill of exchange, Cf. *Bank of England v. Anderson* (1837), 3 Bing. N. C. at 621 and 658.

6. A signature made by another person, but attested by <sup>Sufficiency</sup>mark, is sufficient.<sup>1</sup> <sup>in form.</sup>

7. John Smith, payee, indorses the figures "7, 2, 8," on the back of the note, intending thereby to indorse. This is a valid indorsement.<sup>2</sup>

NOTE.—When a statute requires a document to be signed, not subscribed,<sup>3</sup> a mere mark,<sup>4</sup> or initials,<sup>5</sup> or a stamp,<sup>6</sup> if intended as signatures, are sufficient; and it is immaterial in what part of the document the name is introduced, provided it governs the whole.<sup>7</sup> But legal analogies must be applied with caution to bills which are the creation of custom, and where it is of the utmost importance that a clear title should appear on the face of the instrument. In America the rule is lax. By German Exchange Law, Art. 94, signature by mark is insufficient unless made before a notary.

Art. 50. A corporation is bound by its signature <sup>Signature of</sup>to a bill, without the addition of the corporate <sup>corporation or</sup>seal.<sup>8</sup> <sup>company.</sup>

NOTE.—In order to determine whether a company or other corporation is liable on a bill, three questions must be asked: 1. Has the company the requisite capacity to bind itself by a bill?<sup>9</sup> (Art. 67.) 2. Is the signature on the bill sufficient in form to bind the company?<sup>10</sup> 3. Was the signature placed there by a person having authority to sign bills for the company? It is immaterial that a person who acts within the

<sup>1</sup> *George v. Surrey* (1830), M. & M. 516; *Shank v. Butsch* (1867), 28 Ind. 19.

<sup>2</sup> *Broien v. Butchers and Drovers' Bank* (1844), 6 Hill (N. Y.), 443.

<sup>3</sup> *Vieie v. Osgood* (1849), 8 Barb. (N. Y.) 130.

<sup>4</sup> *Baker v. Dening* (1838), 8 A. & E. 94; *Willoughby v. Moulton* (1866), 47 N. H. 205; *Hilborn v. Alford* (1863), 22 Cal. 482.

<sup>5</sup> *Caton v. Caton* (1867), 2 L. R. H. L. 143; *Palmer v. Stephens* (1845), 1 Den. (N. Y.) 471; *Merchants Bank v. Spicer* (1831), 6 Wend. (N. Y.), 443.

<sup>6</sup> *Saunderson v. Jackson* (1800), 2 B. & P. 238; *Boardman v. Spooner* (1866), 13 Allen (Mass.), 353.

<sup>7</sup> *Schmidt v. Schmelter* (1870), 45 Mo. 502 (maker signed on back of note); *Lincoln v. Hinzey* (1869), 51 Ill. 435.

<sup>8</sup> Cf. *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 382; *Mott v. Hicks* (1823), 1 Cow. (N. Y.), 513; *Hamilton v. R. R.* (1857), 9 Ind. 359.

<sup>9</sup> *Grant on Corp.* p. 61; *Bank v. Dandridge* (1827), 12 Wheat. (U. S.) 64.

<sup>10</sup> *Lindus v. Melrose* (1858), 3 H. & N. 177, Ex. Ch.; approved, *Dutton v. Marsh* (1871), 6 L. R. Q. B. 361. Cf. Art. 76.

Unintentional signature. apparent scope of his authority in signing bills exceeds or contravenes private instructions.<sup>1</sup> See, also, Art. 75, and note.

Art. 52. When a person is induced by fraud to sign a bill under the belief that he is signing a wholly different instrument, his signature is null and void, provided that in so signing he acted without negligence.<sup>2</sup>

#### ILLUSTRATIONS.

1. D., an old man with enfeebled sight, is induced to sign his name on the back of a bill, by being told that it is a railway guarantee which he had promised to sign. The bill is negotiated to a *bona fide* holder. D. is not liable as an indorser.<sup>3</sup> *Aliter*, if able and opportunity to read the instrument, but relies on payee for statement of its contents, as he is guilty of negligence.<sup>4</sup>

2. B. is induced, by fraud, to sign a negotiable note as maker, believing it to be a non-negotiable note for a less sum. It is negotiated to a *bona fide* holder. Negligence is negatived. B. is not liable.<sup>5</sup>

NOTE.—Frauds of this sort are more common in America than in England, owing to the absence of stamp laws.

#### Delivery.

Delivery necessary.

Art. 53. Delivery is the necessary complement of

<sup>1</sup> *Re Land Credit Co.* (1869), 4 L. R. Ch. Ap. 460. As to the powers of *de facto* directors, Cf. *Mahony v. East Holyford Co.* (1875), 7 L. R. H. L. 869.

<sup>2</sup> *Foster v. Mackinnon* (1869), 4 L. R. C. P. 704; *Briggs v. Ewar* (1873), 51 Mo. 245; *Ross v. Doland* (1876), 29 O. St. 473; *Cline v. Guthrie* (1873), 42 Ind. 227; *Butler v. Carns* (1875), 57 Wis. 61; *Homes v. Hale* (1874), 71 Ill. 552.

<sup>3</sup> *Id.*; *Whitney v. Snyder* (1870), 2 Lans. (N. Y.) 477; Cf. *Societe Generale v. Bank* (1873), 27 L. T. N. S. 849.

<sup>4</sup> *Chapman v. Rose* (1874), 56 N. Y. 137; *Swannell v. Watson* (1874), 71 Ill. 456; *Winchell v. Crider* (1876), 29 O. St. 480; *Indiana Bank v. Weekerly* (1879), 67 Ind. 345; *Wright v. Flynn* (1871), 33 Ia. 159; *Shirts v. Overjohn* (1875), 60 Mo. 305. *Contra*, holding such failure to read not negligence, *Anderson v. Walter* (1876), 34 Mich. 479.

<sup>5</sup> *Griffiths v. Kellogg* (1876), 39 Wis. 290; Cf. *Taylor v. Atchinson* (1870), 54 Ill. 196.

every contract on a bill, be it drawing, making, acceptance, or indorsement; and until delivery be made the contract is inchoate and revocable.<sup>1</sup>

*Explanation.*—Delivery means transfer of possession, actual or constructive, from the obligor to the obligee.

#### ILLUSTRATIONS.

1. B., who is indebted to C., makes a note for the amount payable to C. B. dies, and the note is afterwards found among his papers. C. has no right to this note, and if it be given to him he cannot enforce it.<sup>2</sup>

2. B. makes a note in favor of C. and delivers it to a stakeholder (*e. g.*, trustee under composition deed). C. thereby acquires no property in the note.<sup>3</sup>

3. C., the holder of a bill, specially indorses it to D.; C. transmits it by post to X., his own agent. X. informs D. that he has received the bill, but does not give it to him or undertake to hold it on his account. C. can revoke the transaction and cancel his indorsement to D.<sup>4</sup>

4. C., the holder of a bill, specially indorses it to D., and incloses it in a letter addressed to D. The letter, which is put in the office letter-box, is stolen by a clerk of C.'s, who forges D.'s indorsement and negotiates the bill. The property in the bill remains in C.<sup>5</sup>

5. By the regulations of the English Post-office, a letter once posted cannot be reclaimed. If, then, the indorsee of a bill authorize the indorser to transmit it to him by post, the property in the bill passes to the indorsee, and the indorsement

<sup>1</sup> Cf. *Abrey v. Cruz* (1869), 5 L. R. C. P. at 42; *Baxendale v. Bennett* (1878), 3 L. R. Q. B. D. 525; *Burson v. Huntington* (1870), 21 Mich. 415; *First Nat. Bank v. Strang* (1874), 72 Ill. 559; *Wulschner v. Sells* (1882), 87 Ind. 71.

<sup>2</sup> Cf. *Bromage v. Lloyd* (1847), 1 Exch. 82; *Clark v. Boyd* (1825), 2 O. 56; *Fanning v. Russell* (1880), 94 Ill. 386; *Foglesong v. Wickard* (1881), 75 Ind. 258.

<sup>3</sup> Cf. *Latter v. White* (1872), 5 L. R. H. L. 578.

<sup>4</sup> *Brind v. Hampshire* (1836), 1 M. & W. 365; *Muller v. Pondir* (1873), 55 N. Y. 325; *Richards v. Darst* (1869), 51 Ill. 140.

<sup>5</sup> Cf. *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. at 584; *Ledwich v. McKim* (1878), 53 N. Y. 307.

Delivery  
necessary.

becomes complete as soon as the letter which contains the bill is posted; if not so authorized, then as soon as the indorsee accepts such transfer.<sup>1</sup>

6. C., the holder of a note payable to bearer, wishes to remit money to D. For safety of transmission he cuts the note in half and posts one half to D. Before he posts the second half he changes his mind, and writes to D. demanding back the half he has sent. He is entitled to do so, for a partial delivery is ineffectual.<sup>2</sup>

7. A bill is left with the drawee for acceptance. The drawee writes an acceptance on it. The next day the holder calls for the bill: he is merely informed that it is mislaid, and is requested to call the next day. In the meantime the drawee hears that the drawer has failed. He accordingly cancels his acceptance, and the next day delivers the dishonored bill back to the holder. This no acceptance; the drawee was entitled to cancel it.<sup>3</sup>

8. C. & Co. are indebted to D. X., who is a partner in C. & Co., and also agent for D., writes C. & Co.'s indorsement on a bill held by the firm, and puts the bill with some other papers of D., of which he has the custody. This is a valid indorsement by C. & Co., and the property in the bill passes to D.<sup>4</sup>

NOTE.—In Illustration 8 delivery is effected by transfer of the constructive possession, *i. e.*, the actual possession remains unaltered, but it is continued in a different right. A person has the constructive possession of a thing when it is in the actual possession of his servant or agent on his behalf; therefore delivery may be effected without change of actual possession, in three cases; 1. A bill is held by C. on his own account: he subsequently holds it as agent for D. 2. A bill is held by C.'s agent, who subsequently attorns to D., and holds it as his agent. 3. A bill is held by D. as agent for C.; he subse-

<sup>1</sup> *Ex parte Cote* (1873), 9 L. R. Ch. 27; *Sichel v. Birch* (1864), 2 H. & C. 956; *Mitchell v. Byrne* (1853), 6 Rich. L. (S. C.) 171; *Kirkman v. Bank* (1865), 2 Cold. (Tenn.) 397. The contrary result would follow under the Post-office regulations of U. S. allowing letters to be reclaimed by sender after posting.

<sup>2</sup> *Smith v. Mundy* (1860), 29 L. J. Q. B. 172; Cf. *Redmayne v. Burton* (1860), 2 L. T. N. S. 324.

<sup>3</sup> *Bank v. Victoria Bank* (1871), 8 L. R. P. C. 526; Cf. *Dunavan v. Flynn* (1875), 118 Mass. 537.

<sup>4</sup> *Lysaght v. Bryant* (1850), 9 C. B. 46; Cf. *Grimm v. Warner* (1876), 45 Ia. 106.

quently holds it on his own account.<sup>1</sup> There is this difference between an acceptance and the other contracts on a bill. The drawee has no property in the bill, therefore an attornment to the holder will be presumed on slight evidence, perhaps the mere intimation by the drawee of the fact that the acceptance has been written.<sup>2</sup>

Art. 54. As between immediate parties (Art. 88), delivery, in order to be effectual, must be made by the obligor or his agent.

#### ILLUSTRATIONS.

1. C., the holder of a bill, specially indorses it to D. He dies before delivering it, but his executor subsequently hands the bill to D. The indorsement to D. is invalid, for an executor is not the agent of his testator. D. cannot sue on the bill.<sup>3</sup>

2. B. makes a note payable to C. or order one year after his death, and sends it in a sealed wrapper to X., with instructions to return it to B. if he calls for it; otherwise not to be opened in his lifetime. X. may make a valid delivery of the note to the payee upon the maker's death.<sup>4</sup>

3. X., by means of a false pretense, or a promise or condition which he does not fulfill, procures A. to draw a check in favor of C. X. delivers it to C., who receives it *bona fide* and for value. C. acquires a good title, and can sue A., for X. is ostensibly A.'s agent.<sup>5</sup>

4. X. signs a note as surety, on condition that it shall not be delivered by B., the maker, to C., the payee, until signed by Y.

<sup>1</sup> Cf. in illustration *Field v. Carr* (1828), 2 M. & P. 46; *Bosanquet v. Forster* (1841), 9 C. & P. 659; *Belcher v. Campbell* (1845), 8 Q. B. 1. Cf. also *Ancona v. Marks* (1862), 31 L. J. Ex. 163, ratification of delivery; *Ex parte Cote* (1873), 9 L. R. Ch. 27, delivery by mistake and revocation by consent.

<sup>2</sup> Cf. *Cox v. Troy* (1822), 5 B. & Ald. 474; approved *Chapman v. Cottrell* (1865), 3 H. & C. 857; Art. 32 n. Foreign Laws.

<sup>3</sup> *Bromage v. Lloyd* (1847), 1 Exch. 32; *Clark v. Sigourney* (1846), 17 Conn. 511.

<sup>4</sup> *Giddings v. Giddings' adm'r* (1878), 51 Vt. 227; S. C., 31 Am. R. 632. Cf. *Worth v. Case* (1870), 42 N. Y. 362.

<sup>5</sup> Cf. *Watson v. Russell* (1862), 3 B. & S. 34, affirmed, 5 B. & S. 968, Ex. Ch.; *Gould v. Segee* (1856), 5 Duer (N. Y.), 260; *Fearing v. Clark* (1860), 16 Gray (Mass.), 74. *Contra*, unless maker estopped because negligent, *Chipman v. Tucker* (1875), 38 Wis. 43.

Delivery by  
whom.

as co-surety. X. is liable to a *bona fide* holder for value, though delivered contrary to the agreement.<sup>1</sup>

5. A. draws a check payable to bearer, intending to pay it to X. It is stolen from his desk before he issues it, and is subsequently negotiated to C., who takes it for value and without notice. C. acquires a good title and can sue A.<sup>2</sup>

Conditional  
delivery.

Art. 55. As between immediate parties (Art. 88), a bill may be shown to have been delivered conditionally, or for a special purpose only, and not for the purpose of transferring the entire property therein.<sup>3</sup>

#### ILLUSTRATIONS.

1. B. makes a note payable to C., who sues him on it. B. can defend himself by showing that the note was delivered to C. on condition that it was only to operate if he should procure B. to be restored to a certain office, and that B. was not so restored.<sup>4</sup>

2. C., the holder of a bill, indorses it in blank, and hands it to D., on the express condition that he shall forthwith retire certain other bills therewith. He does not do so. D. cannot sue C., and if he sue the acceptor, the latter may set up the *jus tertii*.<sup>5</sup>

3. C., the holder of a bill, indorses it specially to D., in order that he may get it discounted for him. D., in breach of trust, negotiates the bill to E. If E. take the bill *bona fide* and for value, he acquires a good title, and can sue all the parties thereto. If he do not so take it, he cannot sue C.; and if

<sup>1</sup> *Dearndorff v. Foresman* (1865), 24 Ind. 48; Cf. *Gage v. Sharp* ('867), 24 Ia. 15. *Contra*, if non-negotiable, *Ayres v. Milroy* (1873), 53 Mo. 516.

<sup>2</sup> *Ingham v. Primrose* (1859), 7 C. B. N. S. at 85; Cf. *Clarke v. Johnson* (1870), 54 Ill. 296; *Worcester Bank v. Bank* (1852), 10 Cush. (Mass.) 488 (bank bills). But Cf. *Burson v. Huntington* (1870), 21 Mich. 415; *Baxendale v. Bennett* (1878), 3 L. R. Q. B. D. 525.

<sup>3</sup> Cf. *Druiff v. Parker* (1868), 5 L. R. Eq. at 137; *Salmon v. Webb* (1852), 3 H. L. Cas. at 518; *Benton v. Martin* (1873), 52 N. Y. at 574; *Lovejoy v. Bank* (1880), 23 Kans. 331.

<sup>4</sup> *Jeffries v. Austin* (1725), 1 Stra. 674. Because a failure of consideration?

<sup>5</sup> *Bell v. Ingestre* (1848), 12 Q. B. 317; Cf. *Seligman v. Huith* (1877), 37 L. T. 488; Cf. *Ayres v. Doying* (1886), 42 Hun, 630. *Sed qu.* See next note.

he sue the acceptor, the latter may set up that the bill is C.'s;<sup>1</sup> further, C. can bring an action against E. to recover the bill or the proceeds.<sup>2</sup> Conditional delivery.

4. C., the payee of a bill, indorses it to D. D. sues C. as indorser. C. may show that he and D. were jointly interested in the bill, and that he indorsed it to the latter to collect on joint account.<sup>3</sup>

5. B. makes a note for \$100 payable to C. or order. C. sues B. Evidence is admissible to show that the note was given as collateral security for a running account, and what the state of that account is.<sup>4</sup>

NOTE.—Compare this Art. with the next.

*Escrow.*—A deed delivered conditionally is called an escrow, and by analogy the term is sometimes applied to bills. Neither can be delivered as an escrow to the obligee or promisee, but only to a third party.<sup>5</sup> There is, however, this distinction: a deed delivered as an escrow cannot become operative until the condition is fulfilled; but a bill so delivered becomes absolute in the hands of a *bona fide* holder for value without notice, whether the condition is fulfilled or not.<sup>6</sup> When a bill is delivered conditionally or for a special purpose, the relations between the person who so delivers it and the person to whom it is delivered are substantially those of principal and agent.<sup>7</sup> The person to whom it is delivered belongs, perhaps, to the class of agents called bailees;<sup>8</sup> at least, if the terms bailor and bailee be used in the extensive sense given to them by Story, in his work on Bailments.

### Construction.

Art. 56. The contracts on a bill, as interpreted Bills are contracts in writing.

<sup>1</sup> *Lloyd v. Howard* (1850), 15 Q. B. 995; Cf. *Barber v. Richards* (1851), 6 Exch. 63; *Dale v. Gear* (1871), 38 Conn. 15; *Chaddock v. Vanness* (1871), 35 N. J. L. 517. See Art. 54, Illustr. 8.

<sup>2</sup> *Goggerly v. Culbert* (1806), 2 N. R. 170; Cf. *Alsager v. Close* (1842), 10 M. & W. 576; *Mutty Loll v. Dent* (1853), 8 Moore, P. C. 319.

<sup>3</sup> *Denton v. Peters* (1870), 5 L. R. Q. B. 475.

<sup>4</sup> Cf. *Ex parte Twogoud* (1812), 19 Ves. 227; *Re Boys* (1870), 10 L. R. Eq. 467, and Art. 84.

<sup>5</sup> *Massman v. Holscher* (1871), 49 Mo. 87; *Stewart v. Anderson* (1877), 59 Ind. 375; Cf. *McCramer v. Thompson* (1866), 21 Ia. at 249. *Contra*, *Bell v. Ingestre* (1848), 12 Q. B. 317; *Alexander v. Wilkes* (1883), 11 B. J. Lea (Tenn.), 221.

<sup>6</sup> Art. 54; *Whitmore v. Nickerson* (1878), 125 Mass. 496. *Contra*, unless negligent, *Chipman v. Tucker* (1875), 38 Wis. 43.

<sup>7</sup> *Maguire v. Dodd* (1859), 9 Ir. Ch. 452.

<sup>8</sup> Cf. *Lloyd v. Howard* (1850), 15 Q. B. at 1000, Erle, J.; *Manley v. Boycot* (1853), 2 E. & B. at 56, Ld. Campbell.



Bills are  
contracts in  
writing.

by the Law Merchant, are contracts in writing. Extrinsic evidence is not admissible to contradict or vary their effect.<sup>1</sup>

*Explanation.*—Evidence is admissible to impeach the consideration between immediate parties.<sup>2</sup>

*Exception.*—The obligation of the parties to a bill may be released verbally and without consideration: Art. 239.

#### ILLUSTRATIONS.

1. The mere signature of the holder on the back of a bill (indorsement in blank) is a contract in writing to this effect: 1. I hereby assign this bill to bearer. 2. I hereby undertake that if the bearer duly present this bill, and it is not honored, I, on receiving due notice, will indemnify him.<sup>3</sup>

2. Parol evidence is not admissible to show that an indorser in blank agreed to be absolutely liable,<sup>4</sup> or that he indorsed to transfer title only and without recourse,<sup>5</sup> or merely to identify the payee,<sup>6</sup> or that a restrictive indorsement was to be treated as a general indorsement.<sup>7</sup>

3. A. draws a bill on B. in favor of C., and issues it to the latter, who gives value. A. thereby incurs the ordinary obligations of a drawer. If B. dishonor the bill and C. sue A.,

<sup>1</sup> *Abrey v. Cruz* (1869), 5 L. R. C. P. 37.

<sup>2</sup> *Id.* at 45. See Art. 14, and Chap. III.

<sup>3</sup> *Cf. Suse v. Pompe* (1861), 30 L. J. C. P. 75, at 80; *Dale v. Gear* (1871), 38 Conn. 15; *Chaddock v. Vanness* (1871), 35 N. J. L. 517; *Lovejoy v. Bank* (1880), 23 Kan. 331; *Skellon v. Dustin* (1879), 92 Ill. 49; *Prescott Bank v. Caverly* (1856), 7 Gray (Mass.), 217. *Contra, Ross v. Espy* (1870), 66 Pa. St. 481; *Harrison v. McKim* (1865), 18 Ia. 485, but see *American Em. Co. v. Clark* (1878), 47 Ia. at 675.

<sup>4</sup> *Rodney v. Wilson* (1877), 67 Mo. 123; *Bigelow v. Colton* (1859), 13 Gray (Mass.), 309; *Bank v. Smith* (1858), 27 Barb. (N. Y.) 489; *Finley v. Green* (1877), 85 Ill. 535. *Aliter* of quasi-indorsements, Art. 217.

<sup>5</sup> *First Nat. Bank v. Bank* (1873), 20 Minn. 63; *Charles v. Denis* (1877), 42 Wis. 56. *Contra, Harrison v. McKim* (1865), 18 Ia. 485 (because a fraud?); *Commissioners v. Wasson* (1880), 82 N. C. 308; *Day v. Thompson* (1880), 65 Ala. 269; *Taylor v. French* (1879), 2 Lea (Tenn.) 257.

<sup>6</sup> *Stack v. Beach* (1881), 74 Ind. 571.

<sup>7</sup> *Mechanics Bank v. Packing Co.* (1877), 4 Mo. Ap. 200; *Third Nat. Bank v. Clark* (1877), 23 Minn. 263.

oral evidence cannot be admitted to show that A.'s liability as drawer was conditional on the performance of certain acts by C., and that C. had not done them.<sup>1</sup>

4. Bill drawn in ordinary form. Action by payee against acceptor. Evidence is not admissible to show that it was intended to be paid out of a particular fund which is no longer available,<sup>2</sup> or that a bill absolute in terms is in any other respect conditional.<sup>3</sup>

5. Bill drawn conditionally. (Art. 10.) Evidence is not admissible to show that the condition has been performed, and that therefore the bill is no longer conditional and invalid. A bill must be valid *ab initio*.<sup>4</sup>

6. Parol evidence is not admissible to vary the time of payment,<sup>5</sup> or amount payable,<sup>6</sup> or to show an agreement not to negotiate a negotiable bill,<sup>7</sup> or that a bill for one hundred dollars should be payable in goods or bank notes;<sup>8</sup> but may show parol agreement as to place of payment of bill payable generally.<sup>9</sup>

7. B. delivers to C. a note signed "B., Treasr. St. Paul's Parish." Parol evidence to show an agreement that the Parish should be liable and not B. personally, is inadmissible.<sup>10</sup>

8. Bill in the ordinary form accepted by B. and held by D. Evidence is admissible to show that D., after the bill was indorsed to him, was informed that B. had accepted the bill for

<sup>1</sup> *Abrey v. Cruz* (1869), 5 L. R. C. P. 37; Cf. *Am. Em. Co. v. Clark* (1878), 47 Ia. 671; *Wood v. Surrells* (1878), 89 Ill. 107.

<sup>2</sup> *Campbell v. Hodgson* (1819), Gow. 74; Cf. *Richards v. Richards* (1831), 2 B. & Ad. at 454, 455.

<sup>3</sup> *Weaver v. Fries* (1877), 85 Ill. 356; *McDonald v. Elfes* (1878), 61 Ind. 279; *Jones v. Shaw* (1878), 67 Mo. 667; *Tower v. Richardson* (1863), 6 Allen (Mass.), 351.

<sup>4</sup> *Colehan v. Conke* (1793), Willes, 397; *Miller v. Excelsior Stone Co.* (1878), 1 Brad. (Ill.) 273.

<sup>5</sup> Cf. *Drain v. Harvey* (1855), 17 C. B. 257; *Heywood v. Perrin* (1830), 10 Pick. (Mass.) 228; *Strachan v. Muxlow* (1869), 24 Wis. 21.

<sup>6</sup> *Dawson v. Bank* (1842), 4 Scam. (Ill.) 56; Cf. *Besant v. Crose* (1851), 10 C. B. 895; *St. L. Ins. Co. v. Homer* (1845), 9 Met. (Mass.) 39; *Mahan v. Sherman* (1845), 7 Blackf. (Ind.) 378.

<sup>7</sup> *Knox v. Clifford* (1875), 38 Wis. 651.

<sup>8</sup> *Cox v. Wallace* (1839), 5 Blackf. (Ind.) 199; *Bradley v. Anderson* (1833), 5 Vt. 152.

<sup>9</sup> *Cox v. Bank* (1879), 100 U. S. 704, at 713.

<sup>10</sup> *Tucker M. Co. v. Fairbanks* (1867), 98 Mass. 101 at 104; *Sturdirant v. Hull* (1871), 59 Me. 172. Admissible if language ambiguous, *Condon v. Pearce* (1875), 43 Md. 83. Art. 76.

Bills are  
contracts in  
writing.

the accommodation of X., and that D. gave time to X., the principal debtor, without the consent of B., the surety, thereby discharging the latter.<sup>1</sup>

NOTE.—This Art. is not inconsistent with Art. 55. The distinction is this: Evidence is admissible to show that what purports to be a complete contract in writing is merely an inchoate transaction; but evidence is not admissible to vary the terms of an existing and complete contract in writing. The difficulty is to determine within which class a given transaction falls.<sup>2</sup> As between immediate parties a contemporaneous writing,<sup>3</sup> or a subsequent written agreement,<sup>4</sup> may control the effect of a bill, subject to the same conditions that would be requisite in the case of an ordinary contract; but the mere fact that a bill refers to a collateral writing or agreement which is conditional in its terms, will not vitiate the bill in the hands of a person who has no notice of its contents.<sup>5</sup> Cf. also Art. 9 and Art. 14.

Custom of  
trade.

Art. 57. Questions relating to bills, when not concluded by authority, are to be determined by the usage of trade, if such there be.<sup>6</sup>

*Explanation 1.*—The existence, nature, and scope of a given usage is a question of fact.<sup>7</sup>

*Explanation 2.*—A general usage once incorporated into a judicial decision becomes part of the Law Merchant, and evidence of custom to contradict it is inadmissible.<sup>8</sup>

<sup>1</sup> *Oreend v. Oriental Corp.* (1874), 7 L. R. H. L. 348; *Hubbard v. Gurney* (1876), 64 N. Y. 457; Cf. *Nurre v. Chittenden* (1877), 56 Ind. 462; *Irvine v. Adams* (1879), 48 Wis. 468; Cf. Art. 245.

<sup>2</sup> *E. g.*, compare the facts in *Abrey v. Cruz*, *supra*, with those in *Holmes v. Kidd* (1858), 3 H. & N. 891, Ex. Ch.

<sup>3</sup> Cf. *Brown v. Langley* (1842), 4 M. & Gr. 466; *Salmon v. Webb* (1852), 3 H. L. Ca. 510; *Maillard v. Page* (187), 5 L. R. Ex. 312; *Daris v. Brown* (1876), 94 U. S. 423; *Wade v. Wade* (1872), 36 Tex. 529.

<sup>4</sup> *McManus v. Bark* (1870), 5 L. R. Ex. 65.

<sup>5</sup> *Jury v. Baker* (1858), E. B. & E. 459; *Taylor v. Curry* (1871), 109 Mass. 26.

<sup>6</sup> *Goodwin v. Roberts* (1875), 10 L. R. Ex. 337, Ex. Ch. As to allowance of grace, *Mills v. Bank* (1826), 11 Wheat. (U. S.) 431; *Woodruff v. Bank* (1841), 25 Wend. (N. Y.) 673; *Morrison v. Bailey* (1855), 5 O. St. 13. As to demand by notary's clerk, cf. Art. 177 n. See *Daniel*, § 623.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 357; Cf. *Brandao v. Barnett* (1846), 3 C. B. at 530, H. L.; *Perkins v. Bank* (1839), 21 Pick. (Mass.) 483.

## ILLUSTRATIONS.

Custom of trade.

1. Bill indorsed "Pay C.," omitting the words "or order." The court having decided that such bills are still negotiable by indorsement, evidence that by custom they are not negotiable is inadmissible.<sup>1</sup>

2. If a foreign bill be dishonored, the indorser is by the Law Merchant liable for the re-exchange. Evidence that by local custom the holder is entitled either to the re-exchange or to the amount he gave for the bill, at his option, is inadmissible.<sup>2</sup>

3. Action by customer against banker for not honoring a check. The banker may show that the check was marked "post dated," and that it is the custom of bankers in the city of London not to honor checks which are marked post dated.<sup>3</sup>

4. Action by a bank to recover back the proceeds of a check paid a collecting bank, the payee's indorsement having been found two years after payment to have been forged. Evidence of a local usage, making it the bank's duty to examine and satisfy itself as to the genuineness of the indorsement and to return the check immediately, if not good, is inadmissible.<sup>4</sup>

NOTE.—*Goodwin v. Roberts* (1875),<sup>5</sup> is important, as showing that the novelty of a general usage is no objection to its being incorporated into the Law Merchant, thereby to some extent overruling *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 336. A particular or local usage must, it is conceived, be proved *de novo* each time. When both authority and custom are silent, foreign law is usually resorted to as a guide. See *Intro.*, p. xii.

Art. 58. When the terms of a bill are ambiguous, the construction most favorable to the full validity of the instrument must be followed.<sup>6</sup>

Construed favorably

## ILLUSTRATIONS.

1. An acceptance will, if possible, be construed as absolute, not qualified, and a mere memorandum, inconsistent with such

<sup>1</sup> *Edie v. East India Co.* (1761), 2 Burr. 1216.

<sup>2</sup> *Suse v. Pompe* (1860), 30 L. J. C. P. 75.

<sup>3</sup> *Emmanuel v. Roberts* (1868), 9 B. & S. 121.

<sup>4</sup> *Corn Exchange Bank v. Nassau Bank* (1883), 91 N. Y. 74.

<sup>5</sup> 10 L. R. Eq. 337, affirmed, 1 L. R. Ap. Ca. 476.

<sup>6</sup> *Mare v. Charles* (1856), 5 E. & B. at 981, *Ld. Campbell*.

Construed  
favorably.

construction, is to be rejected as being no part of the acceptance.<sup>1</sup>

2. The address to the drawee will be read in with the acceptance, *ut res magis valeat*.

3. Note in the form, "I promise not to pay." The word "not" will be rejected.<sup>2</sup>

4. A note for "three hundred dollars," payable on "the first of March, eighteen and sixty-eight," will be construed as a note for \$300, payable March 1st, 1868.<sup>4</sup>

5. Indorsement in the form, "Pay B., or order, value in account with X." This is not to be construed as restrictive.<sup>5</sup>

6. Holder may treat an ambiguous instrument either as a bill or as a note at option.<sup>6</sup>

7. Instrument invalid as a bill for not designating a drawee. If it be accepted, the holder may treat it as a note.<sup>7</sup>

### Conflict of Laws.

Formal  
requisites.

Art. 59. The validity of a bill as regards requisites in form is (generally) determined by the law of the place of issue, and the formal validity of supervening contracts, such as acceptance or indorsement, is (generally) determined by the law of the place where such contract is made.<sup>8</sup>

### ILLUSTRATIONS.

1. By German law a bill need not express the value re-

<sup>1</sup> *Fanshawe v. Peat* (1857), 26 L. J. Ex. 314; Cf. *Stone v. Metcalfe* (1815), 4 Camp. 217; *Fitch v. Jones* (1855), 5 E. & B. at 246; *U. S. v. Bank* (1841), 15 Pet. (U. S.) 377; *Coffman v. Campbell* (1877), 87 Ill. 98.

<sup>2</sup> *Mare v. Charles*, *supra*; *Wheeler v. Webster* (1850), 1 E. D. Sm. (N. Y.) 1.

<sup>3</sup> *Russell v. Langstaffe* (1781), 2 Dougl. 514.

<sup>4</sup> *Burnham v. Allen* (1854), 1 Gray (Mass.), 496, and *Massie v. Belford* (1873), 68 Ill. 290. Cf. *Ohm v. Young* (1878), 63 Ind. 432; *Deshon v. Leffler* (1879), 7 Mo. Ap. 595.

<sup>5</sup> *Murrow v. Stewart* (1853), 8 Moore, P. C. at 276.

<sup>6</sup> *Edis v. Bury* (1827), 6 B. & C. 433; *Almy v. Winslow* (1879), 126 Mass. 342, at 344.

<sup>7</sup> *Fielder v. Marshall* (1861), 30 L. J. C. P. 158. Cf. Arts. 37 and 274.

<sup>8</sup> Cf. *Guepratte v. Young* (1851), 4 D. & S. 217; *Carnegie v. Morrison* (1841), 2 Met. (Mass.) 381; *Mendenhall v. Gately* (1862), 18 Ind. 149; *Phinney v. Baldwin* (1854), 16 Ill. 108; German Exchange Law, Art. 85; *Nouguier*, §§ 1417-1427.

ceived. By French law it must. A bill drawn in Germany on Paris, expressing no value, is (probably) valid everywhere.<sup>1</sup> Formal  
requisites.

2. By the law of Illinois a verbal acceptance is valid. By the law of Missouri an acceptance must be in writing. A bill drawn in Illinois on St. Louis, in Missouri, payable there, is verbally accepted in Illinois. The acceptance is valid everywhere.<sup>2</sup>

3. X. writes his name on the back of a note made by B., payable to C., before its delivery to the payee. If signed in New York, but delivered in Boston, X. is liable as joint maker, according to the law of Massachusetts, though by the law of New York, he is liable as indorser.<sup>3</sup>

4. By French law a bill must not be drawn and payable in the same place. A bill, issued in France, is both drawn and payable in Calais. It is indorsed and sued on in England. It is (probably) invalid.<sup>4</sup>

*Exception.*—When a bill drawn and payable in one country is negotiated in another, it is sufficient if the negotiation be valid in point of form according to the law of the former.<sup>5</sup>

#### ILLUSTRATIONS.

1. An English note, payable to bearer, is negotiated by delivery in a country where this mode of transfer is not recognized. The title passes by such delivery.<sup>6</sup>

2. Foreign bonds payable to bearer pass by delivery in England, though by English law such a bond would not be assignable.<sup>7</sup>

<sup>1</sup> Cf. *Stix v. Matthews* (1876), 63 Mo. 371.

<sup>2</sup> *Scudder v. Union Bank* (1875), 91 U. S. 406; *Mason v. Dousay* (1864), 35 Ill. 424.

<sup>3</sup> *Lawrence v. Bassett* (1862), 5 Allen (Mass.), 140; Cf. *Patterson v. Carroll* (1877), 60 Ind. 128.

<sup>4</sup> Cf. *Bradlaugh v. DeRin* (1868), 3 L. R. C. P. at 542; *Bristow v. Sequeville* (1850), 5 Exch. 275; *sed contra*, *Wynne v. Jackson* (1826), 2 Russ. 351 and 634.

<sup>5</sup> Cf. *Bradlaugh v. DeRin* (1868), 3 L. R. C. P. at 542; *sed contra*, *Crouch v. Hall* (1853), 15 Ill. 263.

<sup>6</sup> *De la Chaumette v. Bank* (1831), 2 B. & Ad. 385. *Contra*, *Roosa v. Crist* (1856), 17 Ill. 450.

<sup>7</sup> Cf. *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 384.

Formal  
requisites.

NOTE.—The contract is made where delivery is effected, not where the signature is affixed.<sup>1</sup> But the place of delivery cannot be shown to the prejudice of a holder without notice, *e. g.*, note dated at Boston, and in hands of holder without notice of its delivery in New York, where it is void for usury.<sup>2</sup> A few foreign writers, among them Savigny, are of opinion that the maxim *locus regit actum* is purely facultative, never disabling. German Exchange Law, Art. 85, has gone a long way toward adopting this view. How far does the nationality of the parties enter into the question? Suppose an Englishman abroad draws a bill payable in England, sufficient in form according to English law, but defective according to the law of the place where it is drawn, would it not be valid in England? But if a bill bearing date from London was issued in France, it would probably be sufficient if it conformed to the formal requisites of English law. At present the law must be regarded as unsettled.<sup>3</sup>

## Interpretation.

Art. 60. The interpretation of the drawing, indorsement or acceptance of a bill is (generally) determined by the law of the place where such contract is made.

## ILLUSTRATIONS.

1. Action in England on a bill drawn and payable in France and there indorsed in blank. The effect of such indorsement is determined by French law, *i. e.*, it operates as a procuration.<sup>4</sup>

2. A general acceptance given in Paris is (probably) to be interpreted according to French law.<sup>5</sup>

3. Note made and payable in Scotland, in the form, "Pay C. 100L.," without adding the words "or order." By Scotch law such a note is negotiable, though by English law it is not. C. in England, can negotiate it by indorsement.<sup>6</sup>

<sup>1</sup> *Chapman v. Cottrel* (1865), 34 L. J. Ex. 186; *Cook v. Litchfield* (1851), 5 Sandf. (N. Y.) 330; *Butler v. Meyer* (1861), 17 Ind. 77.

<sup>2</sup> *Towne v. Rice* (1877), 122 Mass. 67; *Lennig v. Ralston* (1854), 23 Pa. St. 137.

<sup>3</sup> See *Smith v. Mead* (1830), 3 Conn. 253; *Bullard v. Thompson* (1871), 35 Tex. 313; *Grimshaw v. Bender* (1809), 6 Mass. 162.

<sup>4</sup> *Trimby v. Vignier* (1834), 1 Bing. N. C. 151.

<sup>5</sup> Cf. *Don v. Lipman* (1837), 5 Cl. & F. at 12 & 13; *Freese v. Brownell* (1871), 35 N. J. L. 285.

<sup>6</sup> *Robertson v. Burdekin* (1843), 1 Ross, Scotch L. C. 824; Cf. *Howenstein v. Barnes* (1879), 5 Dillon (C. Ct.), 482.

4. A bill drawn in Belgium on England is indorsed in France in blank. The indorsement is (perhaps) to be interpreted according to French law.<sup>1</sup>

*Exception.*—When a bill is drawn in one country and payable in another, expressions as to time and mode of payment are interpreted by the law of the place of payment.<sup>2</sup>

NOTE.—It has been held that on a bill drawn and payable in England, but indorsed in France in form invalid there, but valid, by English law, the indorsee might maintain suit in England against the *acceptor*, whose contract is to be interpreted by English law; but as between the indorsee and *indorser*, such indorsement would confer no right of action, being governed by the law of France, the *lex loci contractus*.<sup>3</sup> In *Bradlaugh v. DeRin* (1870), 5 L. R. C. P. 473, the Exchequer Chamber held that in the court below, and also in *Lebel v. Tucker and Trimby v. Vignier*, the French law had been mistaken, and that as regards the point raised—*i. e.*, the right of an indorsee under a blank indorsement to sue in his own name—there was no conflict between the laws of France and England, but the principles laid down in those cases are not questioned.

<sup>1</sup> *Bradlaugh v. DeRin* (1868), 3 L. R. C. P. 538; Cf. *Everett v. Vendryes* (1859), 19 N. Y. 436.

<sup>2</sup> Arts. 13 and 20. See, too, the duties of the holder: Arts. 180, 202.

<sup>3</sup> *Lebel v. Tucker* (1867), 3 L. R. Q. B. 77; Cf. *Nichols v. Porter* (1868), 2 W. Va. 13.



## CHAPTER II.

### CAPACITY AND AUTHORITY OF PARTIES TO A BILL.

#### *Capacity.*

General rule

Art. 61. Capacity to incur liability as a party to a bill is co-extensive with capacity to trade and incur trade debts:

Capacity to indorse a bill for the purpose of authorizing the payment thereof, and transferring the property therein, is co-extensive with capacity to sell or transfer personal property.

*Explanation.*—The incapacity of one or more of the parties to a bill does not diminish the liability of the other parties thereto.<sup>1</sup>

#### ILLUSTRATION.

Action by indorsee against the drawer of a bill. It is no defense that the payee was an infant when he indorsed the bill.<sup>2</sup>

NOTE.—Capacity must be distinguished from authority. Capacity is power to contract bestowed by law. Authority is power to contract bestowed by act of parties. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact. Again, capacity to incur liability must be distinguished from capacity to transfer. An executed contract is often valid where an executory contract cannot be enforced: Cf. Arts. 111, 112.

<sup>1</sup> *Grey v. Cooper* (1782), 3 Dougl. 65; French Code, Art. 114; German Exchange Law, Art. 3.

<sup>2</sup> *Id.*; Cf. *Griener v. Ulercy* (1866), 20 La. 266; *Esley v. People* (1880), 23 Kans. 510.

Art. 62. A person who is *non compos mentis* has <sup>No capacity to contract.</sup> no capacity to contract by bill.<sup>1</sup>

NOTE.—The liability for necessities is like that of infants:  
Art. 63. Contracts by bill between parties whose countries are at war, are void.<sup>2</sup>

Art. 63. An infant incurs no liability on a bill, by <sup>Minors liability.</sup> becoming a party thereto.<sup>3</sup>

#### ILLUSTRATION.

B., an infant within three months of attaining his majority, accepts a bill drawn on him for necessities, payable one month after date. He thereby incurs no liability *on the bill*;<sup>4</sup> *a fortiori* if the bill is not for necessities.

*Explanation.*—If his contract is ratified after attaining majority, he becomes liable on the bill.<sup>5</sup>

NOTE.—The ratification may be by the mere act of the party, as in retaining the consideration after a request to return it,<sup>6</sup> or by any language from which a promise to pay may be reasonably implied,<sup>7</sup> if addressed to a party in interest.<sup>8</sup> The ratification is binding though given in ignorance that he was not legally liable on the bill.<sup>9</sup> In England, by a recent statute, an infant's contracts are made incapable of ratification.<sup>10</sup> It was formerly held in England that if an infant traded and accepted bills, he was estopped from setting up his infancy,<sup>11</sup> but this

<sup>1</sup> *Sentance v. Poole* (1827), 3 C. & P. 1; *Jenners v. Howard* (1842), 6 Blackf. (Ind.) 240; *Seaver v. Phelps* (1831), 11 Pick. (Mass.) 304.

<sup>2</sup> *Willson v. Patteson* (1817), 7 Taunt. 439; *Woods v. Wilder* (1870), 43 N. Y. 164.

<sup>3</sup> *Williamson v. Watts* (1808), 1 Camp. 552; *M'Crillis v. How* (1826), 3 N. H. 348.

<sup>4</sup> *Id.*; *Swasey v. Vanderheyden* (1813), 10 Johns. (N. Y.) 33; *Henderson v. Fox* (1854), 5 Ind. 439. *Contra*, *Earle v. Reed* (1845), 10 Met. (Mass.) 387.

<sup>5</sup> *Edgerly v. Shaw* (1852), 5 Fost. (N. H.) 514; *Reed v. Batchelder* (1840), 1 Met. (Mass.) 559.

<sup>6</sup> *Aldrich v. Grimes* (1839), 10 N. H. 194.

<sup>7</sup> *Martin v. Mayo* (1813), 10 Mass. 137; *Whitney v. Dutch* (1817), 14 Mass. 457.

<sup>8</sup> *Hoit v. Underhill* (1838), 9 N. H. 436; *Hodges v. Hunt* (1856), 22 Barb. (N. Y.) 150.

<sup>9</sup> *Morse v. Wheeler* (1862), 4 Allen (Mass.), 570. *Contra*, *Harmer v. Killing* (1804), 5 Esp. 102; *Curtin v. Patton* (1824), 11 S. & R. (Pa.) 305.

<sup>10</sup> Infants' Relief Act (1874), 37 & 38 Vict. c. 62; *Ex parte Kibble* (1875), 10 L. R. Ch. 373.

<sup>11</sup> *Ex parte Lynch* (1876), 2 L. R. Ch. D. 227.

Minor's  
liability.

ruling is no longer law.<sup>1</sup> In the above illustration the infant would be liable on the consideration, though by the weight of authority, not on the bill. The age at which infancy ceases differs much in different countries: *e. g.*, in India it is 18; in Germany, 23. In most continental countries a distinction is drawn between infant traders and non-traders, the former having full capacity.

Minor's  
transfer.

Art. 64. When a bill is payable to the order of an infant, his indorsement (probably) transfers the property therein.<sup>2</sup>

NOTE.—Cf. Art. 68. An infant's executed contracts are usually valid. As an infant may be an agent, his indorsement in that character gives rise to no difficulty. In America it is not uncommon to get a bill made payable to the order of an infant clerk; his indorsement then operates as an indorsement *ans recours*, though without discrediting the bill.

Married wo-  
man's liability.

Art. 65. A married woman incurs no liability by drawing, indorsing or accepting a bill.<sup>3</sup>

#### ILLUSTRATION.

A married woman makes a note, signing it "J. B., widow." She is not liable thereon, even to an innocent holder, though she fraudulently represents herself unmarried.<sup>4</sup> And such note being void is incapable of ratification after discoveriture.<sup>5</sup>

*Exceptions.*—1. Married woman whose husband is *civilitur mortuus*, or an alien resident and domiciled abroad.<sup>6</sup> 2. Married woman divorced *a mensa et thoro*.<sup>7</sup>

<sup>1</sup> *Ex parte Jones* (1881), 18 Ch. D. 109. C. A.

<sup>2</sup> *Frazier v. Massey* (1860), 14 Ind. 382; *Nightingale v. Withington* (1818), 15 Mass. 272; Cf. *Lebel v. Tucker* (1867), 8 B. & S. at 833; *Grey v. Cooper* (1782), 3 Dougl. 65; Indian Code, Art. 26.

<sup>3</sup> *Cannam v. Farmer* (1849), 3 Exch. 698; *Howe v. Wildes* (1852), 34 Me. 566; Cf. *Coward v. Hughes* (1855), 1 K. & J. 443.

<sup>4</sup> *Id.*; *Johnson v. Sutherland* (1878), 39 Mich. 579; Cf. *Lowell v. Daniels* (1854), 2 Gray (Mass.), 161.

<sup>5</sup> *Watkins v. Halstead* (1849), 2 Sandf. (N. Y.) 311; *Porterfield v. Butler* (1872), 17 Miss. 165.

<sup>6</sup> *Abbott v. Bayley* (1827), 6 Pick. (Mass.) 89; *M'Arthur v. Bloom* (1853), 2 Duer (N. Y.), 151.

<sup>7</sup> *Pierce v. Burnham* (1842), 4 Met. (Mass.) 303. *Contra, Lewis v. Lee* (1824), 3 B. & C. 291.

NOTE.—In equity a married woman is liable on contracts charged upon or for the benefit of her separate estate.<sup>1</sup> Enabling statutes have been generally passed, removing many of the disabilities of a married woman. Married woman's liability.

Art. 66. When a bill is payable to the order of a married woman, she cannot by her indorsement transfer the property therein.<sup>2</sup> a Transfer by married woman.

NOTE.—But this does not prevent recovery thereon by the indorsee against the acceptor, who is estopped to dispute the capacity of the payee to indorse: Art. 212. Hence the acceptor may have to pay the bill twice—to the indorsee, whose title he cannot dispute, and to the husband, who still holds the title.<sup>3</sup>

*Exception 1.*—Bill indorsed by married woman under such circumstances as would render her liable on her indorsement. (Art. 65.)

*Exception 2.*—Bill indorsed by married woman as agent for her husband.<sup>4</sup>

#### ILLUSTRATION.

A bill is payable to the "order of Mrs. C." With the consent of her husband she indorses it, signing her own name. The property in the bill passes by this indorsement.<sup>5</sup>

NOTE.—*Qu.* if in the case given, the husband would not be liable as indorser? See *Lindus v. Bradwell* (1848), 5 C. B. 583. But see *Brown v. Donnell* (1861), 49 Me. at 425.

Art. 67. A corporation incurs no liability by drawing, indorsing, or accepting a bill, unless express- Liability of company or corporation.

<sup>1</sup> *McHenry v. Davies* (1870), 10 L. R. Eq. 88; Cf. *London Bank v. Lampriere* (1873), 4 L. R. P. C. at 583-594; *Yale v. Dederer* (1860), 22 N. Y. 450; *Todd v. Lee* (1862), 15 Wis. 365.

<sup>2</sup> Cf. *Smith v. Marsack* (1848), 6 M. G. & S. 488; *Savage v. King* (1840), 17 Me. 301; *Tillinghast v. Holbrook* (1862), 7 R. I. 230; *Evans v. Secrest* (1852), 8 Ind. 545; Art. 98. But Cf. *Contra, Harding v. Cobb* (1873), 47 Miss. 599.

<sup>3</sup> *Id.* at 503; *Prescott Bank v. Caverly* (1856), 7 Gray (Mass.), 217.

<sup>4</sup> *Prince v. Brunette* (1835), 1 Bing. N. C. 435; Cf. *Slawson v. Loring* (1862), 5 Allen (Mass.), 340.

<sup>5</sup> *Cotes v. Davis* (1808), 1 Camp. 485; *Sterens v. Beals* (1852), 10 Cush. (Mass.) 291; *Hanck Bank v. Joy* (1856), 41 Me. 568; *Moreau v. Branson* (1871), 37 Ind. 195.

Liability of  
company or  
corporation.

ly or impliedly empowered by its Act of incorporation so to do.<sup>1</sup>

*Explanation.*—Capacity of a corporation to bind itself by a bill, is co-extensive with its capacity to contract.<sup>2</sup>

#### ILLUSTRATIONS.

1. A corporation is chartered to erect a monument. If liable on a given contract, it is liable on a bill properly accepted in pursuance thereof.<sup>3</sup>

2. A joint stock company is incorporated for the purpose of forming a *société anonyme* abroad for the construction of railways. The directors are empowered by the memorandum and articles of association to do whatever they may from time to time think incidental or conducive to the main object of the company. These terms cover the issue of bills, and such a company is liable on its acceptance.<sup>4</sup>

3. A corporation chartered to build a railroad, gives its note for materials used in the construction of the road. It is liable thereon.<sup>5</sup> *Aliter*, if it accepts for accommodation to aid another company in constructing its road.<sup>6</sup>

NOTE.—The rule as to the capacity of corporations to contract by bill is much more liberal in America than in England, where it is held that, in case of non-trading corporations, the power must be expressly given, or there must be terms in the charter wide enough to include it. In England, a mining company, a cemetery company, a salvage company, a gas company, an alkali works company, and a water works company, have been held non-trading companies.<sup>7</sup> Cf. Art. 78, as to non-trading partnerships. There is this distinction: A non-trading partnership can adopt a bill, but the bill of a corporation lack-

<sup>1</sup> *Re Peruvian Ry. Co.* (1867), 2 L. R. Ch. 617; *Mott v. Hicks* (1823), 1 Cow. (N. Y.) 513.

<sup>2</sup> *Curtis v. Smith* (1857), 15 N. Y. at 66; *Came v. Brigham* (1854), 39 Me. 35.

<sup>3</sup> *Hayward v. Pilgrim Society* (1838), 21 Pick. (Mass.), 270; Cf. *Davis v. Building Union* (1869), 32 Md. 285.

<sup>4</sup> *Re Peruvian Ry. Co.* (1867), 2 L. R. Ch. 617.

<sup>5</sup> *Hardy v. Merriweather* (1860), 14 Ind. 203; *Hamilton v. R. R. Co.* (1857), 9 Ind. 359. *Contra*, in England, Cf. *Bateman v. Ry.* (1866), 1 L. R. C. P. 499.

<sup>6</sup> *Smead v. R. R. Co.* (1858), 11 Ind. 104.

<sup>7</sup> *Bateman v. Ry.*, *supra*, at 505.

ing capacity is, as regards the corporation, incurably bad; for a contract *ultra vires* of a corporation cannot be ratified.<sup>1</sup> And the same distinction exists between contracts *ultra vires*, and contracts executed by an agent of a corporation without authority; and moreover the latter become binding in the hands of a *bona fide* holder for value, but the former can acquire no additional validity by negotiation.<sup>2</sup> Query, if the rule in England as to drawing bills or making notes applies to checks. Is a non-trading corporation liable on the instrument to the bearer of a dishonored check which it has drawn, or is it only liable on the consideration to its immediate obligee?

Art. 68. When a bill is payable to the order of a corporation, the indorsement of the corporation passes the property therein, though from want of capacity the corporation may not be liable as indorser.<sup>3</sup>

NOTE.—So, too, bankers may be justified in paying checks out of the funds of a company, where clearly, by the form of the checks, the company would not be liable as drawers if they had not been paid.<sup>4</sup>

### Authority.

Art. 70. Subject to any exceptions mentioned in this chapter, bills are governed by the ordinary rules of law relating to principal and agent, and partnership.

Art. 71. No person is liable as a party to a bill whose signature is not on it.<sup>5</sup>

### ILLUSTRATIONS.

1. A., who is agent for X., draws a bill in his own name upon

<sup>1</sup> *Martin v. Zellerbach* (1869), 38 Cal. at 311; *Brown v. Winnisimmet Co.* (1865), 11 Allen (Mass.), at 331. Exceptions: *Bradley v. Ballard* (1870), 55 Ill. 418; *Bissell v. R. R. Co.* (1860), 22 N. Y. 289; *Stephens v. Bank* (1879), 88 Pa. St. 157.

<sup>2</sup> *Smead v. R. R. Co.* (1858), 11 Ind. 104.

<sup>3</sup> *Smith v. Johnson* (1858), 3 H. & N. 222; *Brown v. Donnell* (1861), 49 Me. 421; Cf. Arts. 60, 80, 81.

<sup>4</sup> *Mahoney v. East Holyford Co.* (1875), 7 L. R. H. L. 869 and 884.

<sup>5</sup> Cf. *Fenn v. Harrison* (1790), 3 T. R. at 761; *Re Adanson Co.* (1874), 43 L. J. Ch. at 734, James, L. J. But see next note.

Signature  
essential to  
liability.

B., payable to C. C. knows that A. is only an agent. A. alone is liable as drawer of this bill. X. is not.<sup>1</sup>

2. B. and X. are jointly indebted to C. B. alone makes a note in favor of C. for the amount of the debt. B. alone is liable as a maker.<sup>2</sup>

3. B. makes a note in C.'s favor, signing it "B., agent," or "B., Receiver," or "B., Trustee," etc. C. knows B. is acting as agent for X. B. alone is liable as maker.<sup>3</sup>

4. A. draws a bill, signing it "J. A., agent." J. A. alone is liable as drawer. His principal is not.<sup>4</sup>

5. A. draws a bill on "B., agent," and B. writes across the face, "Accepted, B., agent." B. alone is liable as acceptor.<sup>5</sup>

6. D. is the holder of a bill indorsed in blank by C. D. converts C.'s indorsement in blank into a special indorsement to E. and transfers the bill to the latter. D. is not liable as indorser.<sup>6</sup>

NOTE.—Bills form an exception to the ordinary rule that when a contract is made by an agent in his own name, evidence is admissible to charge the undisclosed principal, though not to discharge the agent. A person who has not signed, though not liable on the instrument, may of course be liable on the consideration: *e. g.*, X. would be so liable in Illust. 2. The distinction is this: In the one case the liability is transferable; in the other it is not; also the *onus probandi* is shifted.

*Explanation 1.*—The term person includes firm, company and corporation.

#### ILLUSTRATIONS.

1. X., a partner in a firm who trade as "John Brown," makes a note for \$100 in respect of a partnership transaction, signing it as "Brown & Co." He has no authority from his

<sup>1</sup> Cf. *Leadbitter v. Farrow* (1816), 5 M. & S. at 350; *Ex parte Rayner* (1868), 17 W. R. 64; *Arnold v. Sprague* (1861), 34 Vt. 409.

<sup>2</sup> *Siffkin v. Walker* (1809), 2 Camp. 308.

<sup>3</sup> *Williams v. Robbins* (1860), 16 Gray (Mass.), 77; *Collins v. Ins. Co.* (1867), 15 O. St. 215; *Powers v. Briggs*, (1875), 79 Ill. 493.

<sup>4</sup> *Pentz v. Stanton* (1833), 10 Wend. (N. Y.) 271. But see *Hicks v. Hinde* (1850), 9 Barb. (N. Y.) 528, not liable if principal disclosed to payee. Cf. Art. 91, liability of agent to his principal on the bill.

<sup>5</sup> *Slawson v. Loring* (1862), 5 Allen (Mass.), 340.

<sup>6</sup> *Vincent v. Horlock* (1808), 1 Camp. 442.

partners to vary the firm style. The firm is not liable on this note, though B. individually is bound by it.<sup>1</sup> Signature  
essential to  
liability.

2. A. is a partner in the firm of "B. & Co." A., in respect of a partnership transaction, draws a bill in his individual name on "B. & Co." It is refused acceptance. A. alone is liable as drawer; his co-partners are not.<sup>2</sup>

NOTE.—A certain class of cases seems to form an exception to this Article, as they do not pretend to be in conflict with decisions of the same court sustaining the rule, though it is difficult to see any sound reason for the distinction. Thus, on a bill payable to "C., Cash.," and indorsed "C., Cash.," the bank of which C. is cashier is held liable as indorser.<sup>3</sup> There is better reason for holding that in such case the holder is authorized to write over the indorsement, "For the X. bank," and thus convert it into the proper form of an indorsement of the corporation.<sup>4</sup> If, in *Illust. 1*, B.'s partners had authorized the change of style, the altered style would have been *pro hac vice* the firm style, and binding on them. The firm, too, is bound if the variation in style be immaterial and unintentional.<sup>5</sup> And if there be not a distinct firm style, it seems a partner may sign the individual names of his co-partners.<sup>6</sup> Cf. Art. 50, Signature of Corporation.

*Explanation 2.*—A person is bound by his signature who signs a bill in an assumed or fictitious name adopted as his own.<sup>7</sup>

<sup>1</sup> *Faith v. Richmond* (1840), 11 A. & E. 339; *Kirk v. Blurton* (1841), 9 M. & W. 284.

<sup>2</sup> *Nicholson v. Rickets* (1860), 29 L. J. Q. B. at 65; *Re Adanson Co.* (1874), 43 L. J. Ch. 782. firm composed of four firms; *Macklin v. Crutcher* (1869), 6 Bush (Ky.), 401.

<sup>3</sup> *Houghton v. Bank* (1870), 26 Wm. 663; *Bank v. Muskingum Bank* (1864), 29 N. Y. 619; *Pratt v. Bank* (1874), 12 Kans. 570; *Garton v. Bank* (1876), 34 Mich. 279; *Elwell v. Dodge* (1861), 33 Barb. (N. Y.) 336 (insurance corp.). *Contra*, *Bank v. Lyman* (1848), 20 Vt. 666.

<sup>4</sup> *Bank v. Patchin Bank* (1855), 13 N. Y. 309; *Folger v. Chase* (1836), 18 Pick. (Mass.) 63.

<sup>5</sup> *Forbes v. Marshall* (1855), 11 Exch. 166; *Mott v. Hicks* (1823), 1 Cow. (N. Y.) 513. As to accidental misspelling, see *Leonard v. Wilson* (1834), 2 Cr. & M. 589; *Kirk v. Blurton* (1841), 9 M. & W. 289.

<sup>6</sup> *Kitner v. Whitlock* (1878), 88 Ill. 513; *Norton v. Seymour* (1847), 16 L. J. C. P. 100. May so sign though firm name, *Filley v. Phelps* (1847), 18 Conn. at 301; *Trowbridge v. Cushman* (1836), 24 Pick. (Mass.) 310.

<sup>7</sup> Cf. *Lindus v. Bradwell* (1848), 5 C. B. at 591; *Bartlett v. Tucker*, (1870), 104 Mass. 336; Cf. Art. 37, Expl. 2, and *Trueman v. Loder* (1840), 11 A. & E. at 594.



Signature  
essential to  
liability.

## ILLUSTRATIONS.

1. John Smith carries on business under the name of "John Brown," or "Brown & Co," or "The London Iron Company." John Smith is liable on a bill drawn, indorsed, or accepted by him in any of these names.<sup>1</sup>

2. A principal trades and carries on a business in the name of one of his agents (a clerk). He is liable on a bill accepted by the clerk in his own name in respect of that business, although the clerk in accepting it acted contrary to his private instructions.<sup>2</sup>

NOTE.—Cf. *Lindley*, p. 357. So, too, a firm may trade under its own name in one place, and under the name of one of the partners in another place. His name then becomes the firm name.<sup>3</sup>

*Explanation 3.*—The signature of a firm is deemed to be the signature of all persons who are partners in the firm, whether working, dormant, or secret;<sup>4</sup> or who, by holding themselves out as partners, are liable as such to third parties.<sup>5</sup>

## ILLUSTRATIONS.

1. X. is a working partner in the firm of "B. & Co." He retires from the firm, but gives no notice of his retirement. He is liable on a bill accepted by the firm subsequent to his retirement.<sup>6</sup>

2. B. and C. are secret partners of A., who carries on the business in his own name. He takes a note for the purchase price of firm property and indorses it away. B. and C. are liable as indorsers.<sup>7</sup>

NOTE.—It was formerly thought that where two distinct

<sup>1</sup> Cf. *Wilde v. Keep* (1834), 6 C. & P. 235; *Forman v. Jacob* (1815), 1 Stark. 47.

<sup>2</sup> *Edmunds v. Bushell* (1865), 1 L. R. Q. B. 96; Cf. *Melledge v. Boston Iron Co.* (1849), 5 Cush. (Mass.) 176; *Conro v. Port Henry Iron Co.* (1851), 12 Barb. (N. Y.) 27; *Lockwood v. Coley* (1884), 22 Fed. Rep. 192.

<sup>3</sup> Cf. *Alliance Bank v. Kearsley* (1871), 6 L. R. C. P. at 438.

<sup>4</sup> *Pooley v. Driver* (1876), 5 L. R. Ch. D. 458; *Lindley*, pp. 355-357.

<sup>5</sup> *Gurney v. Evans* (1858), 27 L. J. Ex. 166; *Lindley*, pp. 355-357.

<sup>6</sup> *Davis v. Allen* (1849), 3 N. Y. at 172; *Lindley*, pp. 418-426.

<sup>7</sup> *Mohawk Nat. Bank v. Van Slyck* (1883), 29 Hun, 188; *Lindley*, p. 357.

firms, having one or more partners in common, carried on business under the same name, each firm was liable on the acceptances of the other to a *holder* for value without notice; see *Lindley*, 3d ed., 387. But since the case of *Yorkshire Banking Co. v. Beatson*,<sup>1</sup> it seems clear that this hard rule is no longer law.

Art. 72. It is immaterial by whose hand a signature is made, provided there be authority to sign.<sup>2</sup>

Hand that signs immaterial.

#### ILLUSTRATION.

Bill payable to C.'s order, and indorsed in his name. It is proved that C.'s wife had authority to indorse bills for him, and that in this case C.'s name was written by his daughter, in the presence and by the direction of his wife. This is sufficient.<sup>3</sup>

NOTE.—In the case of a corporation, it is clear that the signature must be by the hand of an agent.

Art. 73. An authority to sign bills on behalf of another may be either express (verbal<sup>4</sup> or written), or implied from circumstances.<sup>5</sup>

Express authority not necessary.

#### ILLUSTRATIONS.

1. X, in B.'s presence, and with his assent, indorses a bill in B.'s name. This is to all intents and purposes an indorsement by B.<sup>6</sup>

2. It is shown that X. is in the habit of accepting bills in B.'s name; that B. is aware of it, and duly honors such bills. This is evidence from which an authority to X. to accept bills may be implied.<sup>7</sup>

3. C., the holder of a bill payable to order, transfers it for value to D. without indorsing it. This is not an authority to D. to indorse it in C.'s name.<sup>8</sup>

<sup>1</sup> *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109, C. A.

<sup>2</sup> *Lord v. Hall* (1849), 8 C. B. 627.

<sup>3</sup> *Id.*; Cf. *Woodbury v. Woodbury* (1866), 47 N. H. 11.

<sup>4</sup> *Right Worthy, etc., Odd Fellows v. First Nat. Bank* (1880), 42 Mich. 461 (agent of corporation).

<sup>5</sup> *Prescott v. Flyn* (1832), 9 Bing. 19; Cf. Art. 81, Excep. 1.

<sup>6</sup> *Lord v. Hall*, *supra*; *Handyside v. Cameron* (1859), 21 Ill. 588.

<sup>7</sup> Cf. *Morris v. Bethell* (1869), 5 L. R. C. P. at 51; *N. Y. Iron Mine v. Bank* (1878), 39 Mich. at 651-652.

<sup>8</sup> *Harrop v. Fisher* (1861), 30 L. J. C. P. 233.

Express authority not necessary.

*Explanation.*—Where an express authority to the agent must be proved or is relied on, such authority is to be strictly construed.<sup>1</sup>

#### ILLUSTRATIONS.

1. An authority to draw bills does not include an authority to indorse them.<sup>2</sup>
2. An authority to an agent to receive payment from B. by drawing on him does not authorize the agent to draw a bill payable to his own order.<sup>3</sup>
3. An authority to draw checks does not authorize drawing post-dated checks, which are bills of exchange.<sup>4</sup>
4. An authority to A. to draw bills in B.'s name does not authorize drawing bills in the joint names of A. and B.<sup>5</sup>
5. An authority to accept a bill does not authorize an acceptance for accommodation.<sup>6</sup>
6. An authority to draw at six months does not authorize drawing at sixty days.<sup>7</sup>

Signature per proc. principal.

Art. 74. A signature "per procuration," or in other terms which denote that the signature of the principal is placed on the bill by the hand of an agent, operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature to the extent of the actual authority possessed by the agent.<sup>8</sup>

#### ILLUSTRATIONS.

1. B., who carries on business for himself, and is also in

<sup>1</sup> *Atwood v. Munnings* (1827), 7 B. & C. 278; Cf. *Fearn v. Filica* (1844), 7 M. & Gr. 513; *Rossiter v. Rossiter* (1832), 8 Wend. (N. Y.) 494.

<sup>2</sup> Cf. *Prescott v. Flynn* (1832), 9 Bing. at 22.

<sup>3</sup> *Hogarth v. Wherley* (1875), 10 L. R. C. P. 530.

<sup>4</sup> *Forster v. Mackreth* (1867), 2 L. R. Ex. 163.

<sup>5</sup> *Stainback v. Read* (1854), 11 Grat. (Va.) 281; *Bryan v. Berry* (1856), 6 Cal. 394.

<sup>6</sup> *Wallace v. Bank* (1840), 1 Ala. 565; *North River Bank v. Aymar* (1842), 3 Hill (N. Y.), 262.

<sup>7</sup> *Batty v. Carswell* (1806), 2 Johns. (N. Y.) 48; *Newhall v. Dunlop* (1837), 14 Me. 180.

<sup>8</sup> Cf. *Charles v. Blackwell* (1877), 2 L. R. C. P. D. at 159-160, C. A. But see next note.

partnership with X., goes abroad; he gives X. an authority to <sup>Signature per</sup> accept bills in his name in respect of his private business. X. <sup>proc. principal.</sup> accepts a bill in B.'s name in respect of the partnership business, signing "p.p. X. B." The bill is negotiated. B. is not liable on this acceptance.<sup>1</sup>

2. By a resolution of the directors, the chairman of a company is authorized to accept bills drawn by A. against the deposit of securities. He accepts a bill drawn by A., signing per proc. the company, without requiring the deposit of security. The bill is negotiated to a *bona fide* holder. The company is liable.<sup>2</sup>

NOTE.—There is perhaps a disposition to narrow the rule in the case of corporations.<sup>3</sup> In an Irish case<sup>4</sup> a distinction is drawn between an acceptance signed "J. B. per proc. T. S.," and one signed "For J. B. T. S." The distinction does not seem founded on any very clear principle. The case can be supported on other grounds.

Art. 74 is taken without change from the English work, yet it does not seem to be the true rule in America. Is the mere form in which the agent signs the criterion? Is not rather the real distinction between a general agent and a special agent?<sup>5</sup> If the party dealing with the agent has notice, either from the form of signature or in any other way, that the agent is acting under a special authority, whether written or oral, he is chargeable with notice of the extent of that authority.<sup>6</sup> But he is not bound to go further and see that the agent is acting in good faith toward his principal. Illustr. 2, *supra*. In the case of a general agent, the principal is bound on all contracts within his ostensible authority, though authorized in writing to do certain specified acts only.<sup>7</sup>

Art. 75. A person who, without authority, signs <sup>Signature per</sup> the name of another person to a bill, either simply or <sup>proc. agent.</sup>

<sup>1</sup> *Atwood v. Munnings* (1827), 7 B. & C. 278; *Stagg v. Elliott* (1862), 12 C. B. N. S. 373.

<sup>2</sup> *Re Land Credit Co.* (1869), 4 L. R. Ch. 460; and Cf. *Ex parte Meredith* (1863), 32 L. J. Ch. 300; *North River Bank v. Aymar* (1842), 3 Hill (N. Y.), 262.

<sup>3</sup> *Re Land Credit Co.* (1869), 4 L. R. Ch. at 468.

<sup>4</sup> *O'Reilly v. Richardson* (1865), 17 Ir. Com. L. R. 74; but Cf. *Balfour v. Ernest* (1859), 28 L. J. C. P. at 176.

<sup>5</sup> See argument of counsel in *Stagg v. Elliott*, *supra*, at 375, and at 382, Willes, J.

<sup>6</sup> Cf. *North River Bank v. Aymar*, *supra*; *Nixon v. Palmer* (1853), 8 N. Y. 398; *Murdock v. Mills* (1846), 11 Met. (Mass.) at 15.

<sup>7</sup> Cf. *Hartford Ins. Co. v. Wilcox* (1870), 57 Ill. 180; *Minor v. Bank* (1828), 4 Pet. (U. S.) 46; Cf. Art. 77.

Signature per  
proc. agent.

by a procuration signature, is not liable on the instrument,<sup>1</sup> unless adopted as his own at the time of signing.<sup>2</sup>

#### ILLUSTRATIONS.

1. A bill drawn on B. is held by C. X., without authority, accepts it for B., signing "B. per proc. X." X. is not liable as acceptor, though he may be liable to C. or a subsequent holder in an action for a false representation.<sup>3</sup>

2. Two directors of a limited company, which has no power to accept a bill, accept a bill "per proc." the company. They may be personally liable in an action for false representation.<sup>4</sup>

NOTE.—In an action for false representation, under such circumstances, it lies on the holder to prove damage.<sup>5</sup> The modern tendency is to restrict liability *ex delicto* to cases of intentional fraud. By German Exchange Law, Art. 95, a person who, without authority, signs a bill as agent for another, is personally liable thereon.

Signature as  
agent or repre-  
sentative.

Art. 76. A person who signs a bill in a representative or official character, or who, in signing, describes himself as agent for a principal, whether named or not, is personally liable thereon, unless in express terms he repudiate such liability.<sup>6</sup>

#### ILLUSTRATIONS.

1. Money is lent to a parish. The churchwardens give a note for the amount, signing it "J. B., } Churchwardens." They are personally liable on the note as makers.<sup>7</sup>

<sup>1</sup> *Polhill v. Walter* (1832), 3 B. & Ad. 114; *Bartlett v. Tucker* (1870), 104 Mass. 536; *Duncan v. Niles* (1863), 32 Ill. 532; *Hall v. Crandall* (1866), 29 Cal. 567; *Walker v. Bank* (1852), 13 Barb. (N. Y.), 636. *Contra*, *Dodd v. Bishop* (1878), 90 La. An. 1178; *Weare v. Gove* (1862), 44 N. H. 196; Cf. *Byars v. Doores* (1855), 20 Mo. 284.

<sup>2</sup> Cf. Art. 71. Expl. 2; *Kelner v. Baxter* (1866), 2 L. R. C. P. 174; *Blanchard v. Kaull* (1872), 44 Cal. 440.

<sup>3</sup> *Polhill v. Walter* (1832), 3 B. & Ad. 114.

<sup>4</sup> *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D. 360, C. A.; see at p. 362.

<sup>5</sup> *Eastwood v. Bain* (1858), 3 H. & N. 738.

<sup>6</sup> *Leadbitter v. Farrow* (1816), 5 M. & S. 348; *Bradlee v. Boston Glass Co.* (1835), 15 Pick. (Mass.) at 550.

<sup>7</sup> *Rew v. Pettit* (1834), 1 A. & E. 196; Cf. *Hays v. Crutcher* (1876), 54

2. B. by will directs his executor to carry on his business. He does so, and in the course of the business accepts bills, signing "J. S., executor of B." He is personally liable on these acceptances.<sup>1</sup>

3. D., the holder of a bill payable to his order, dies. X., his executor, indorses the bill away, signing the indorsement, "J. X., executor of D." X. is personally liable on this indorsement, unless he add some such words as "without recourse against me personally."<sup>2</sup>

4. Money is lent to the X. Company. A note for the amount is given in the form, "We promise to pay, *et cet.*," signed,

"J. B., }  
"J. S., } Directors of the X. Company, Limited.  
"J. T., Manager."

The persons who sign are personally liable as makers.<sup>3</sup>

5. Note in the form, "We, the directors of the X. Company, Limited, *et cet.*" (signed by the directors), "J. B. J. S." In the corner of the note is the seal of the company, and the signature of an attesting witness. J. B. and J. S. are personally liable.<sup>4</sup>

6. A. issues a bill for \$100, addressed to the X. Insurance Co., and ending, "and charge the same to the account of A., Agent X. Ins. Co." A. is personally liable to the payee as drawer, though known to be acting as agent.<sup>5</sup>

7. Money is lent to the X. Railway Co. A note for the amount is given in the form, "I promise to pay, *et cet.*" (signed), "For the X. Railway Co. J. B., Secretary." J. B. is not personally liable.<sup>6</sup>

Ind. 260; *Powers v. Briggs* (1875), 79 Ill. 493. But see *Johnson v. Smith* (1852), 21 Conn. 627.

<sup>1</sup> *Liverpool Bank v. Walker* (1859), 4 DeG. & J. 24; *Rittenhouse v. Ammerman* (1876), 64 Mo. 197; *Studebaker Mfg. Co. v. Montgomery* (1881), 74 Mo. 101; *Curtis v. Nat. Bank* (1883), 39 O. St. 579. But Cf. *Hardy v. Pilcher* (1879), 57 Miss. 18.

<sup>2</sup> Cf. *Childs v. Monins* (1821), 2 B. & B. 460. But see next note.

<sup>3</sup> *Courtauld v. Saunders* (1867), 16 L. T. N. S. 562; *Mellen v. Moore* (1878), 68 Me. 390. But Cf. *Pitman v. Kintner* (1839), 5 Blackf. (Ind.) 250.

<sup>4</sup> *Putton v. Marsh* (1871), 6 L. R. Q. B. 361. But Cf. Illustr. 12, *infra*.

<sup>5</sup> *Tucker Manuf. Co. v. Fairbanks* (1867), 98 Mass. 101. But see *Maher v. Overton* (1835), 9 La. (O. S.) 115, and next note.

<sup>6</sup> *Alexander v. Sizer* (1869), 4 L. R. Ex. 102; but see *Gray v. Raper* (1866), 1 L. R. C. P. 694.

Signature as  
agent or rep-  
resentative.

8. Note in the form, "We jointly and severally promise, *et cet.*" (signed), "J. B. J. S., Agents for B." J. B. and J. S. are not personally liable.<sup>1</sup> And the same rule applies if the promise in the body of the note is expressed to be by "J. B., Agent for B."<sup>2</sup>

9. Note in the form, "I, as Treasurer of the X. Society, promise, *et cet.*" (signed), "B., Treasurer." B. is not personally liable (probably).<sup>3</sup>

10. Note in the form, "The X. Co. promise, *et cet.*" (signed), "B., President." B. is not personally liable.<sup>4</sup>

11. Note in the form, "I promise, *et cet.*" (signed) "B., by her trustee, X." X. is not personally liable.<sup>5</sup>

12. A bank check is signed, "B., Treasurer," but having the words "Ætna Mills" printed in the margin. B. is not personally liable as drawer.<sup>6</sup>

13. Bill specially indorsed to "C., agent." He indorses it away, signing "C., agent." C. is personally liable as indorser.<sup>7</sup>

NOTE.—For further illustrations, Cf. Art. 71 and Art. 37, Exp. 3. The terms agent, manager, etc., attached to a signature, are regarded as mere *designatio personæ*. The rule is applied with peculiar strictness to bills, because of the non-liability of the principal. Cf. Art. 71. It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal. The maxim *ut res magis valeat* governs the construction. Where the language is ambiguous, oral evidence is admissible to ascertain the intent of the parties.<sup>8</sup> A distinction is taken by some authorities between an indorsement, "X. agent," and other bill contracts in the same

<sup>1</sup> *Rice v. Gore* (1839), 22 Pick. (Mass.) 158; *Jefts v. York* (1849), 4 Cush. (Mass.) 37.

<sup>2</sup> Cf. *Jones v. Clark* (1871), 42 Cal. 180. *Contra, Morrell v. Coddington* (1862), 4 Allen (Mass.) 403.

<sup>3</sup> *Baylow v. Cong. Society* (1864), 8 Allen (Mass.), 460; *Blanchard v. Kau* (1872), 44 Cal. 440. But Cf. *East Tenn. Co. v. Gaskell* (1879), 2 Lea (Tenn.), 742; *Burlingame v. Brewster* (1875), 79 Ill. 515.

<sup>4</sup> *Hall v. Crandall* (1866), 29 Cal. 567; *Duncan v. Niles* (1863), 32 Ill. 532; *Whitney v. Snow* (1873), 111 Mass. 368; *Armstrong v. Kirkpatrick* (1881), 79 Ind. 527.

<sup>5</sup> *Taylor v. Shelton* (1861), 30 Conn. 122.

<sup>6</sup> *Carpenter v. Farnsworth* (1871), 106 Mass. 561.

<sup>7</sup> *Bartlett v. Hawley* (1876), 120 Mass. 92. But see next note.

<sup>8</sup> *Klosterman v. Loos* (1874), 58 Mo. 290; *Sanborn v. Neal* (1860), 4 Minn. 126.

form, holding it equivalent to an indorsement *sans recours*—Signature as  
a declaration that the indorser will not be personally liable, <sup>agent of rep-</sup>  
whoever else may be.<sup>1</sup> And the same rule has been applied to <sup>resentative.</sup>  
a drawer.<sup>2</sup> As to the liability of an agent to his *principal*, see  
Art. 91, Illusts. 5, 6.

Art. 77. A partner in a trading firm has *prima* Trading firm.  
*facie* authority to bind the firm by drawing, indorsing,  
or accepting bills in the firm name for partnership  
purposes;<sup>3</sup> and if the bill get into the hands of a  
holder for value without notice, the presumption of  
authority becomes absolute, and it is immaterial  
whether it was given for partnership purposes or not.<sup>4</sup>

## ILLUSTRATIONS.

1. X., a partner in a trading firm, makes a note in the firm's  
name, payable to C., and gives it to him in payment of a pri-  
vate debt. It lies on C. to show that X. had authority from  
his copartners so to do.<sup>5</sup> But the firm would be liable to an  
indorsee without notice.<sup>6</sup>

2. X.; a partner in a trading firm, makes a note in the firm  
name, payable to C. for his accommodation, or as surety for him,  
without the knowledge of the other partners. The firm is not  
liable to C.,<sup>7</sup> but would be liable to a *bona fide* holder for  
value.<sup>8</sup>

3. A. draws two bills on a firm in respect of one and the

<sup>1</sup> *Mott v. Hicks* (1823), 1 Cow. (N. Y.) 513.

<sup>2</sup> *Hicks v. Hinde* (1850), 9 Barb. (N. Y.) 528.

<sup>3</sup> *Wiseman v. Easlon* (1863), 8 L. T. N. S. 637; *Kimbrow v. Bullitt*  
(1859), 22 How. (U. S.) 256; *Nat. Bank v. McDonald* (1879), 127 Mass.  
82; *Lindh v. Crowley* (1883), 29 Kans. 756; *Walsh v. Lennon* (1881), 98  
Ill. 27; S. C., 38 Am. R. 75 (sealed note).

<sup>4</sup> *Winship v. Bank* (1831) 5 Pet. (U. S.) 529; *Wright v. Brosseau*  
(1874), 73 Ill. 381; *Atlantic State Bank v. Savery* (1880), 82 N. Y. 291;  
*Deitz v. Regnier* (1882), 27 Kans. 94.

<sup>5</sup> Cf. *Levieson v. Lane* (1862), 32 L. J. C. P. 10; *Davis v. Cook* (1872),  
14 Nev. 265; *Union Bank v. Underhill* (1880), 21 Hun (N. Y.), 178.

<sup>6</sup> *Smyth v. Strader* (1845), 4 How. (U. S.) 404; *Parker v. Burgess*  
(1858), 5 R. I. 277.

<sup>7</sup> *Heffron v. Hanaford* (1879), 40 Mich. 305; *Sweetser v. French*  
(1848), 2 Cush. (Mass.) 309; *Spurck v. Leonard* (1881), 9 Bredw. (Ill.)  
174.

<sup>8</sup> *Austin v. Vandermark* (1843), 4 Hill (N. Y.), 259; *Chemung Bank*  
*v. Bradner* (1871), 44 N. Y. 680.



Trading firm. same debt. By mistake both bills are accepted. The bills are negotiated to *bona fide* holders. The firm is liable on both.<sup>1</sup>

4. A partner accepts in the firm name a bill drawn on the firm in respect of a debt partly due from the firm and partly due from himself alone. Fraud is negatived, but the holder knows the facts. The *pro tanto* liability of the firm on the instrument is doubtful.<sup>2</sup>

NOTE.—In Illust. 4, the safe plan is to sue on the consideration. This Art. and the next are merely deductions from the general rule that a partner has implied authority to do any act necessarily incidental to the proper conduct of the partnership business, and that there the presumption of authority ends.

Non-trading firm.

Art. 78. A partner in a non-trading partnership has *prima facie* no authority to render his copartners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible.<sup>3</sup>

*Explanation.*—Partnerships, such as professional partnerships (*e. g.*, attorneys,<sup>4</sup> physicians<sup>5</sup>), mining partnerships,<sup>6</sup> agricultural partnerships,<sup>7</sup> coffee brokers,<sup>8</sup> and commission agencies,<sup>9</sup> have been held non-trading.

NOTE.—In *Harris v. Amery* (1865), 1 L. R. C. P. at 154, Willes, J., points out that the term “trade” is not co-extensive with the term “business.” It does not seem to be decided how far the rule applies to checks, as well as to bills and notes. The question can not often arise, because opening an

<sup>1</sup> *Davison v. Robertson* (1815), 3 Dow, 218, H. L.

<sup>2</sup> *Ellston v. Deacon* (1866), 2 L. R. C. P. at 21. Cf. *Wilson v. Forder* (1870), 20 O. St. 89.

<sup>3</sup> *Lindley*, p. 280; *Dickinson v. Valpy* (1829), 10 B. & C. at 137; *Thicknesse v. Bromilow* (1832), 2 Cr. & J. 425; *Tappan v. Bailey* (1842), 4 Met. (Mass.) 529.

<sup>4</sup> *Garland v. Jacob* (1873), 8 L. R. Ex. at 219; *Breckenridge v. Shrieve* (1836), 4 Dana (Ky.), 375; *Smith v. Sloan* (1875), 37 Wis. 285.

<sup>5</sup> *Crosthwait v. Ross* (1839), 1 Humph. 23.

<sup>6</sup> *Ricketts v. Bennett* (1847), 4 C. B. at 699; *Jones v. Clark* (1871), 42 Cal. 180; Cf. *Gray v. Ward* (1856), 18 Ill. 32.

<sup>7</sup> *Kimbro v. Bullitt* (1859), 20 How. (U. S.) 256. But Cf. *McGregor v. Cleaveland* (1830), 5 Wend. (N. Y.) 475.

<sup>8</sup> *Third Nat. Bank v. Snyder* (1881), 10 Mo. App. 211.

<sup>9</sup> *Yates v. Dalton* (1859), 28 L. J. Ex. 69.

account in the firm name is evidence of actual authority. <sup>Non-trading</sup> Note that authority to draw checks is not evidence of author- <sup>firm.</sup> ity to draw bills, and a post-dated check is a bill.<sup>1</sup>

Art. 79. Where a bill is payable to the order of <sup>Power to trans-</sup> a firm, a partner who can not by his indorsement ren- <sup>fer.</sup> der his copartners liable, may transfer the property therein by negotiating it in the firm name.<sup>2</sup>

#### ILLUSTRATIONS.

1. Bill specially indorsed to a non-trading partnership. One of the partners, without communicating with his copartners, indorses it away for a firm debt. The property in the bill passes to the indorsee.<sup>3</sup>

2. Bill specially indorsed to a firm under a wrong style (e.g., to "Smith, Brown & Co.," whereas the proper style is "Brown & Co."). One of the partners indorses it away, using without the assent of the rest, the wrong style. The firm is not liable on the indorsement, but the property in the bill passes to the indorsee.<sup>4</sup>

NOTE.—Cf. Art. 71 as to the principle. When a bill payable to the order of a firm is indorsed by a partner in the firm name, in fraud of his copartners, the property therein does not pass to an indorsee with notice, but there seem to be technical difficulties in the way of an action brought by the firm.<sup>5</sup> In such case the proper course (perhaps) is to give notice to the acceptor not to pay. He could defend an action against a holder with notice.

Art. 80. When a bill is payable to the order of a <sup>Ex-partners.</sup> firm, and the partnership is subsequently dissolved, the indorsement of an ex-partner in the late firm name transfers the property therein and authorizes the payment thereof.<sup>6</sup>

<sup>1</sup> *Forster v. Mackreth* (1867), 2 L. R. Ex. 163.

<sup>2</sup> *Lindley*, p. 282; *Bredow v. Mut. Sav. Inst.* (1859), 28 Mo. 181, and Cf. Arts. 61, 64, 68.

<sup>3</sup> Cf. *Smith v. Johnson* (1858), 3 H. & N. 222.

<sup>4</sup> *Williamson v. Johnson* (1823), 1 B. & C. 146; *Kirk v. Blurton* (1841), 9 M. & W. at 287.

<sup>5</sup> *Heilbutt v. Nevill* (1870), 5 L. R. C. P. 478, Ex. Ch.

<sup>6</sup> *King v. Smith* (1829), 4 C. & P. 108; *Lewis v. Reilly* (1841), 1 Q. B.

Ex-partners.

NOTE.—*Lewis v. Reilly*,<sup>1</sup> may be open to question in so far as it lays down that an ex-partner by indorsing a bill in the late firm name, renders his former partners liable as indorsers to a holder with notice of the dissolution.<sup>2</sup>

### *Forgery, etc.*

Forged or unauthorized signatures.

Art. 81. No person is liable as a party to a bill whose signature has been placed thereon without his authority, and no right or title can be derived through a forged or unauthorized signature.<sup>3</sup> (Cf. Art. 139.)

### ILLUSTRATIONS.

1. A bill is payable to the order of John Smith. Another person of the name of John Smith gets hold of it and indorses it to D., who takes it in good faith and for value. D. acquires no title to the bill; he cannot enforce payment against any of the parties thereto;<sup>4</sup> and should any party pay him, the payment is invalid.<sup>5</sup>

2. A bill is payable to C.'s order. His indorsement is forged. D., a subsequent holder, presents the bill for acceptance. The drawee accepts it, payable at his bankers'. The bankers pay D. They cannot debit the acceptor with this payment.<sup>6</sup>

3. A bill is payable to the order of a firm. X., one of the partners, fraudulently indorses it in the firm name to D. in payment of a private debt. The acceptor pays D. X. be-

849. *Contra. Fellows v. Wyman* (1856), 33 N. H. 251; *Parker v. Macomber* (1836), 18 Pick. (Mass.) 505; *Geortner v. Trustees of Canajoharie* (1847), 2 Barb. 625.

<sup>1</sup> *Lewis v. Reilly*, (1841), 1 Q. B. 349.

<sup>2</sup> Cf. *Lindley*, p. 423; *Kilgour v. Finlayson* (1789), 1 H. Bl. 155; *Abel v. Sutton* (1800), 3 Esp. 108; *Anderson v. Weston* (1840), 6 Bing. N. C. 296.

<sup>3</sup> *Bank of Bengal v. Fagan* (1849), 7 Moore P. C. at 72; *Harrop v. Fisher* (1861), 30 L. J. C. P. 283; *Carpenter v. North Bank* (1877), 123 Mass. 66; *Massé Droit Commercial*, § 1529.

<sup>4</sup> *Mead v. Young* (1790), 4 T. R. 28.

<sup>5</sup> *Graves v. American Bank* (1858), 17 N. Y. 205 (payment); *Welsh v. Bank* (1878), 73 N. Y. 424; Cf. *Ogden v. Bruns* (1874), L. R. 9 C. P. 513.

<sup>6</sup> *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.

comes bankrupt. X.'s copartners and trustee can recover from D. the money he received on the bill.<sup>1</sup>

Forged or unauthorized signature.

4. C. specially indorses a bill to D. It is stolen before delivery to D., and D.'s indorsement in blank is forged on it. It comes into X.'s hands, and he gets his bankers to present it for payment. They receive payment and credit X. with the amount. X. subsequently draws out the whole sum. C. can recover the amount of the bill from the bankers.<sup>2</sup>

*Exception 1.*—An unauthorized signature may be ratified, though it amount to a forgery.<sup>3</sup>

#### ILLUSTRATIONS.

1. Note for \$100. X. forges B.'s signature to it as maker. Before the note matures the holder finds out that B.'s signature is a forgery, and threatens to prosecute X. In order to prevent this, B. gives the holder a memorandum, which says, "I hold myself responsible for the note for \$100, bearing my signature." The ratification is valid, and B. is liable on the note.<sup>4</sup>

NOTE.—The authorities in England and America are directly in conflict on this point, and cannot be reconciled on the ground of estoppel.<sup>5</sup> But there can be no ratification of a forged signature in favor of a party who acts *mala fide*.<sup>6</sup>

*Exception 2.*—A person whose signature is forged or placed on a bill without his authority, may be estopped from setting up the fact. (Cf. Arts. 52 and 73.)

<sup>1</sup> *Heilbutt v. Nerill* (1870), 5 L. R. C. P. 478, Ex. Ch.; *Gale v. Miller* (1874), 54 N. Y. 536.

<sup>2</sup> *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. 578; Cf. *Charles v. Blackwell* (1877), 2 L. R. H. L. 200, at 221.

<sup>3</sup> *Greenfield Bank v. Crafts* (1862), 4 Allen (Mass.), 447; *Gleason v. Henry* (1873), 71 Ill. 109. *Contra*, *Brook v. Hook* (1871), 6 L. R. Ex. 89; Cf. *Williams v. Bayley* (1866), 1 L. R. H. L. 200 at 221; But Cf. *McKenzie v. British Linen Co.* (1881), 6 App. Cas. at p. 99, H. L. per Ld. Blackburn.

<sup>4</sup> Cf. *Union Bank v. Middlebrook* (1865), 33 Conn. 95; *Howard v. Duncan* (1870), 3 Lans. (N. Y.) 174. *Contra*, *Brook v. Hook* (1871), 6 L. R. Ex. 89; Cf. *Esdaile v. La Nauze* (1835), 1 Y. & C. 394.

<sup>5</sup> *Greenfield Bank v. Crafts*, *supra*; *Gleason v. Henry* (1873), 71 Ill. 109. *Contra*, *Brook v. Hook* (1871), 6 L. R. Ex. 89; Cf. *Williams v. Bayley* (1866), 1 L. R. H. L. 200 at 221.

<sup>6</sup> *McHugh v. County* (1871), 67 Pa. St. 391.

Forged or unauthorized signatures.

#### ILLUSTRATIONS.

1. B.'s acceptance to a bill is forged. A holder who takes it *bona fide* is afterwards informed that the signature is not B.'s, and accordingly writes to inquire. B. writes back to say the signature is his. B. is liable on this acceptance.<sup>1</sup>

2. X., a partner in a trading firm, fraudulently accepts a bill in the firm name for a private debt of his own. It is negotiated to a holder for value without notice. The firm is estopped from setting up X.'s fraud.<sup>2</sup>

3. The acceptor of a bill forges A.'s name thereon as drawer, then discounts it with a bank. The bill is dishonored and notice sent to A. The acceptor gets the bill renewed for a small sum, paying the difference in cash to the bank, and on the renewal again forges A.'s name as drawer. The renewed bill is dishonored and notice sent to A. A. does not repudiate the transaction for fourteen days. He is not estopped from setting up that his signature was forged.<sup>3</sup>

*Exception 3.*—If a bill is payable to the order of a married woman, as forming part of her separate estate, and her husband forges her indorsement, the property in the bill (probably) passes thereby to a holder who takes it for value and without notice.<sup>4</sup>

*Exception 4.*—A party to a bill may be estopped by his conduct;<sup>5</sup> or, in certain cases, by the fact of becoming a party,<sup>6</sup> from setting up that the signatures of other parties thereto are forged or unauthorized.

<sup>1</sup> *Brook v. Hook* (1871), 6 L. R. Ex. at 100; *Wilkinson v. Stoney* (1839), 1 J. & S. 509; *Roberts v. Tucker* (1851), 16 Q. B. at 577; *Woodruff v. Munroe* (1870), 33 Md. 146; *Melvin v. Hodges* (1874), 71 Ill. 422.

<sup>2</sup> *Hogg v. Skeen* (1865), 18 C. B. N. S. at 432, Willes, J.; *Parker v. Burgess* (1858), 5 R. I. 277.

<sup>3</sup> *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82, H. L.

<sup>4</sup> *Dawson v. Prince* (1858), 27 L. J. Ch. 169, L. JJ.

<sup>5</sup> *Arnold v. Cheque Bank* (1876), L. R. 1 C. P. D. 578.

<sup>6</sup> Cf. Estoppels, Drawer, Art. 216; Maker, Art. 287; Indorser, Art. 219; Acceptor, Art. 212; Acceptor, *supra protest*, Art. 223; Fictitious Payee, Art. 139; Fictitious Drawee, Art. 2.

NOTE.—Where an estoppel by negligence is relied on, it must appear that the negligence was the direct and proximate cause of the forgery being taken as genuine.<sup>1</sup> Where a bill is held under a forged signature, the Court will restrain its negotiation by injunction, or order it to be given up and canceled.<sup>2</sup>

<sup>1</sup> *Arnold v. Cheque Bank* (1876), L. R. 1 C. P. D. 578.

<sup>2</sup> *Esdaile v. La Nauze* (1835), 1 Y. & C. 394; *Joyce on Injunctions*, p. 366.

## CHAPTER III.

### CONSIDERATION.

#### *Value Defined.*

Value defined. Art. 82. "Value" means "valuable consideration," and is constituted by

(a.) Any consideration sufficient to support a simple contract.

#### ILLUSTRATIONS.

1. A cross acceptance,<sup>1</sup> the forbearance of the debt of a third person,<sup>2</sup> the compromise of a disputed liability,<sup>3</sup> a promise to give up a bill thought to be invalid,<sup>4</sup> a debt barred by the statute of limitations,<sup>5</sup> or a debt discharged in bankruptcy,<sup>6</sup> constitutes value.

2. A mere moral obligation,<sup>7</sup> a debt represented to be due though not really due,<sup>8</sup> the giving up a void note,<sup>9</sup> or a voluntary gift of money,<sup>10</sup> do not constitute value.

<sup>1</sup> *Rose v. Sims* (1830), 1 B. & Ad. at 526; Cf. *Iurdon v. Benton* (1847), 9 Q. B. 843; *Hornblower v. Proud* (1819), 2 B. & Ald. 327; *Turner v. Rogers* (1876), 121 Mass. 12.

<sup>2</sup> *Balfour v. Sea Assurance Co.* (1857), 3 C. B. N. S. 300; *Meltzer v. Doll* (1883), 91 N. Y. 365; *Guy v. Bibend* (1871), 41 Cal. 323.

<sup>3</sup> *Cook v. Wright* (1861), 30 L. J. Q. B. 321; *Harms v. Aufield* (1875), 79 Ill. 2. 7; *Wyatt v. Evins* (1875), 52 Ala. 285.

<sup>4</sup> *Smith v. Smith* (1863), 13 C. B. N. S. 418.

<sup>5</sup> *Latouche v. Latouche* (1865), 3 H. & C. at 576; *Wilton v. Eaton* (1879), 127 Mass. 174; *Mall v. Van Trees* (1875), 50 Cal. 547.

<sup>6</sup> *Trueman v. Fenton* (1777), Cowp. 544; *Way v. Sperry* (1850), 6 Cush. (Mass.) 238. But Cf. *Walbridge v. Harron* (1846), 18 Vt. 44.

<sup>7</sup> *Eastwood v. Kenyon* (1840), 11 A. & E. 438; Cf. *Flight v. Reed* (1863), 3 L. J. Ex. 265.

<sup>8</sup> *Southall v. Rigg* (1851), 11 C. B. 481.

<sup>9</sup> *Coward v. Hughes* (1855), 1 K. & J. 443; *Tucker v. Ronk* (1876), 43 Ia. 80; but Cf. *Mather v. Maidstone* (1855), 18 C. B. 273, where an estoppel intervened.

<sup>10</sup> *Hill v. Wilson* (1873), 8 L. R. Ch. at 894.

(b.) An antecedent or pre-existing debt.<sup>1</sup>

Value defined.

*Explanation.*—When the consideration for the issue or subsequent negotiation of a bill is an antecedent debt, it is immaterial whether the instrument is payable on demand or at a future time.<sup>2</sup>

NOTE.—(1.) The bill may be received in *absolute payment*, that is, in extinguishment of the original debt, *e. g.*, bill indorsed without recourse, or transferred by delivery, so that the debtor is not still liable for the debt in another form as indorser. In such case, the holder is a holder for value by all the authorities.<sup>3</sup> (2.) Or it may be received as *conditional payment* only, the usual signification of “payment” as used in the cases, and whether he is then a holder for value or not, depends on the same questions which arise when the bill is taken as collateral security,<sup>4</sup> as to which, see Art. 84, note.

In *Ex parte Richdale*,<sup>5</sup> the payee of a post-dated check paid it in to his bankers who credited it to his account. The payee failed, and it was held that his trustee could not recover the amount from the drawer on the broad ground that as soon as his account was credited with the amount of the check the bankers became holders for value, whether his account was overdrawn or not. It may be doubtful how far this principle could be supported in its generality, or pressed beyond similar facts.

*Adequacy of value.*—Valuable consideration has been defined as “some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.”<sup>6</sup> The Courts do not inquire into the adequacy of a *bona fide* consideration.<sup>7</sup> But inadequacy of consideration may be evidence of bad faith or

<sup>1</sup> *Poirier v. Morris* (1853), 2 E. & B. 89; *Swift v. Tyson* (1842), 16 Pet. (U. S.) 1; Cf. *Butcher v. Stead* (1875), 7 L. R. H. L. 839.

<sup>2</sup> *Currie v. Misa* (1875), 10 L. R. Ex. Ch. 153, approved but affirmed on another ground, 1 L. R. Ap. Ca. 554. Approved in *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95.

<sup>3</sup> *Bank v. Gilliland* (1840), 23 Wend. (N. Y.) 311; *Heath v. Silvertown Co.* (1875), 39 Wis. 146; *Bardsley v. Delp* (1879), 88 Pa. St. 420.

<sup>4</sup> *Blanchard v. Stevens* (1849), 3 Cush. (Mass.) at 168. But see *Fletcher v. Chase* (1844), 16 N. H. 38, and *Rice v. Riatt* (1844), 16 N. H. 116; *Roxborough v. Messick* (1856), 6 O. St. 448; *Ryan v. Chew* (1862), 13 Ia. 589, drawing distinction in favor of holder of paper as conditional payment.

<sup>5</sup> *Ex parte Richdale* (1881), 19 Ch. D. 409, C. A.

<sup>6</sup> *Currie v. Misa* (1875), 10 L. R. Ex. at 162, per Lush. J.

<sup>7</sup> *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 616, H. L.; *Earl v. Peck* (1876), 64 N. Y. 536.



Value defined. fraud.<sup>1</sup> Again, inadequacy of consideration must be distinguished from partial absence of consideration (Art. 91), partial failure of consideration (Art. 93), part payment on account,<sup>2</sup> or a mere advance made on a bill which is pledged or deposited as security (Art. 84).

*Unconscionable bargains.*—Although the adequacy of the value given will not be inquired into where parties contract on an equality, the Court in the exercise of its equitable powers will grant relief, as between immediate parties, either with or without terms, when an unfair advantage has been taken of a person's position, though there may be nothing amounting to positive fraud; *e. g.*, in case of a catching bargain, with an expectant heir or reversioner.<sup>3</sup>

### *Holder for Value without Notice.*

Holder for  
value.

Art. 83. If value has at any time been given for a bill, the holder of it is a holder for value as regards the acceptor and all parties prior to such time.<sup>4</sup>

#### ILLUSTRATIONS.

1. B. owes C. \$50. In order to pay C. A., at B.'s request, draws a bill on B. for \$50, in favor of C. C. is a holder for value and can sue A., though A. has received no value.<sup>5</sup>
2. A. draws a bill on B. payable to his own order. B. to accommodate A. accepts it. Subsequently A. gives value to B. A. is a holder for value.<sup>6</sup>

*Explanation 1.*—It is immaterial that the value is given by or to a person who never signed the instrument, or whose signature has been struck out.<sup>7</sup>

#### ILLUSTRATIONS.

1. B. makes a note in favor of C. C. is the treasurer of a loan society, and the consideration for the note is money advanced by the society to B. C. is a holder for value.<sup>8</sup>

<sup>1</sup> *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 616. H. L.; *Gould v. Segre* (1856), 5 Duer (N. Y.), 260; Cf. *Allen v. Davis* (1850), 20 L. J. Ch. 44; *Simon v. Cridland* (1862), 5 L. T. N. S. 524; *Lay v. Wissman* (1873), 36 Ia. 305.

<sup>2</sup> *Dresser v. Missouri Co.* (1876), 93 U. S. 92.

<sup>3</sup> *Aylesford v. Morris* (1873), L. R. 8 Ch. Ap. 484; *Nevill v. Snelling* (1880), 15 Ch. D. 679.

<sup>4</sup> *Hunter v. Wilson* (1849), 4 Exch. 489; *Watson v. Flannagan* (1855), 14 Tex. 354.

<sup>5</sup> *Scott v. Lifford* (1808), 1 Camp. 246.

<sup>6</sup> *Burdon v. Benton* (1847), 9 Q. B. 893.

<sup>7</sup> Cf. *Fairclough v. Paria* (1854), 9 Exch. 690 (signature struck out).

<sup>8</sup> *Lomas v. Bradshaw* (1850), 19 L. J. C. P. 273.

2. C. the holder of a bill indorses it in blank to D., receiving no value. D. for value transfers it by delivery to E. E. is a holder for value.<sup>1</sup>

3. A. at the request of X. draws a bill payable to C. for X.'s account with C. X. remits the bill to C. C. is a holder for value. It is immaterial that there is no consideration between A. and X., or that the consideration fails.<sup>2</sup>

4. S., in the West Indies, is indebted to C. in Paris. In order to pay him S. remits money to X., his correspondent in London, who thereupon obtains a bill for the amount, drawn by A. upon Paris, payable to C.'s order. X. remits the bill to C., but fails before he pays A. for it. S. subsequently pays C. C. is a holder for value, and can sue A.<sup>3</sup>

NOTE.—In Illust. 4, C. would be trustee for S. As to the effect of this, Cf. Art. 141.

*Sale of Bill.*—In legal language a bill is said to be sold when it is transferred by delivery without indorsement. Not so in mercantile language. Suppose X. in London wishes to pay 1000 rupees to C. in India. X. goes to A., who has a correspondent in Calcutta, and gets him to draw a bill on Calcutta for Rs. 1000. Usually the bill is drawn payable to C., but sometimes is drawn payable to X., who then indorses it to C. The amount paid by X. to A. for this bill depends on the rate of exchange between London and Calcutta on the day of the transaction. In some trades the custom is for X. to pay A. when he gets the bill; in other trades it is the custom not to pay till the next mail day. Such a transaction is called a sale of the bill by A. to X. X., the buyer, who sends the bill out to India, is called the Remitter. As to fixing the rate of exchange at which a bill is to be sold, see Art. 13, Expl. 1. See, too, the judgment of Wood, V. C., explaining the practice of paying for bills partly by cash, partly by bankers' "marginal notes."<sup>4</sup>

*Explanation 2.*—Subject to Art. 84, the fact that the holder of a bill is a creditor of the person from whom he received it does not make such holder a

<sup>1</sup> *Barber v. Richards* (1851), 6 Exch. 63; *Brummel v. Enders* (1868), 18 Gratt. (Va.) at 905.

<sup>2</sup> *Munroe v. Bordier* (1849), 8 C. B. 862; *Watson v. Russell* (1862), 3 B. & S. 34; 5 B. & S. 968.

<sup>3</sup> *Poirier v. Morris* (1853), 2 E. & B. 89.

<sup>4</sup> *Jeffreys v. Agra Bank* (1866), 2 L. R. Eq. 676; Cf. *Ex parte Kemp* (1874), 9 L. R. Ch. 383.

Holder for  
value.

holder for value unless he received it in respect of his debt.<sup>1</sup>

*Explanation 3.*—A holder for value may or may not be a *bona fide* holder for value without notice.<sup>2</sup>

*Explanation 4.*—The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it. (Cf. Arts. 87 and 134, Expl. 2.)

#### ILLUSTRATION.

C., the payee of a bill, holds it for value. He indorses it to D. without value, *e. g.*, by way of gift or for collection. D. is, as regards the drawer and acceptor, a holder for value.<sup>3</sup>

Pledge or Lien.

Art. 84. A holder who has a lien on a bill, arising either from agreement or by implication of law, is deemed to be a holder for value to the extent of the sum for which he has a lien.

*Explanation.*—A bill is *prima facie* presumed to have been negotiated to the holder for value, and not to have been pledged or deposited as collateral security.<sup>4</sup>

#### ILLUSTRATIONS.

1. D. holds a bill indorsed in blank as agent for C. D. wrongfully pledges it with E. E. is a holder for value to the extent of the sum he advanced, and if he took the bill without notice of the fraud, he can retain the bill as against C., the true owner.<sup>5</sup>

2. C., the holder of a bill for \$100, deposits it with D. as

<sup>1</sup> *De la Chaumette v. Bank* (1829), 9 B. & C. 208; explained by *Currie v. Misa* (1875), 10 L. R. Ex. at 164, Ex. Ch.

<sup>2</sup> *Raphael v. Bank* (1855), 17 C. B. at 172; Cf. Arts. 86, 98.

<sup>3</sup> *Milnes v. Dawson* (1850), 5 Exch. 948; Cf. *Denton v. Peters* (1870) 5, L. R. Q. B. at 477; and Art. 141.

<sup>4</sup> *Hills v. Parker* (1866), 14 L. T. N. S. 107; *Re Boys* (1870), 10 L. R. Eq. 467; *Trustees v. Hill* (1861), 12 Ia. 462.

<sup>5</sup> *Collins v. Martin* (1797), 1 B. & P. 643.

security for a running account. At the time the bill matures Pledge or Lien. the balance is in C.'s favor, but subsequently the balance turns against him to the extent of \$50. D. is a holder for value as to \$50.<sup>1</sup>

3. C., the holder of a bill for \$100, indorses it to D. as a pledge for \$50. D. is a holder for value as to \$50, and this is the sum he can recover if he sues C.<sup>2</sup>

4. C. keeps with his bankers a loan account and a general account. C. indorses to the bank, as collateral security for his loan account, a bill for \$1000, and draws against it to the extent of \$500. C. becomes bankrupt, and his general account is overdrawn more than \$500. The bank are holders of the bill for full value.<sup>3</sup>

NOTE.—Leaving this Art. as in the English work, the American law on this point may be summarized as follows: The person to whom a bill has been *negotiated*<sup>4</sup> (Art. 106) as *conditional* payment (Cf. Art. 82, n.) or as collateral security, is a holder for value: (1.) If so taken for a debt created at the time of the transfer.<sup>5</sup> (2.) If so taken for a pre-existing debt, provided there is either an express agreement to extend the time of payment thereof,<sup>6</sup> or an agreement to that effect implied from the acceptance of the security merely,<sup>7</sup> or from other circumstances, *e. g.*, the course of business between the parties and commercial usage of the place,<sup>8</sup> equality in amount of the security and the debt,<sup>9</sup> or the surrender of securities,<sup>10</sup> or some other consideration.<sup>11</sup> Thus far the authorities are agreed. (3.) If so taken for a pre-existing debt, though there be no

<sup>1</sup> *Attwood v. Croudie* (1816), 1 Stark. 483; Cf. *Pease v. Hirst* (1829), 10 B. & C. 122; *Gray v. Seckham* (1872), 7 L. R. Ch. at 683.

<sup>2</sup> *Attenborough v. Clarke* (1858), 27 L. J. Ex. 138.

<sup>3</sup> *Re European Bank* (1872), 8 L. R. Ch. 41.

<sup>4</sup> *Hedges v. Sealy* (1850), 9 Barb. (N. Y.) 214; *Trust Co. v. Bank* (1879), 101 U. S. 68; *McCrum v. Corby* (1873), 11 Kans. 464; *Terry v. Allis* (1863), 16 Wis. 478.

<sup>5</sup> *Bank v. Vanderhorst* (1865), 32 N. Y. 553; *Best v. Crall* (1880), 23 Kans. 482; *Logan v. Smith* (1876), 62 Mo. 455; *Curtis v. Mohr* (1864), 18 Wis. 645.

<sup>6</sup> *Goodman v. Simonds* (1857), 20 How. (U. S.) 343; *Outes v. Bank* (1879), 100 U. S. 239; *Moore v. Ryder* (1875), 65 N. Y. 438.

<sup>7</sup> *Blanchard v. Stevens* (1849), 3 Cush. (Mass.) 162 at 169; *Holzworth v. Koch* (1875), 26 O. St. 33; but see *Moore v. Ryder*, *supra*.

<sup>8</sup> Cf. *Bank of Metropolis v. Bank* (1843), 1 How. (U. S.) 234; *Bigelow*, p. 500.

<sup>9</sup> Cf. *Michigan Bank v. Leavenworth* (1855), 23 Vt. 209.

<sup>10</sup> *Pratt v. Coman* (1868), 37 N. Y. 440; *Naglee v. Lyman* (1859), 14 Cal. 450.

<sup>11</sup> *Stotts v. Byers* (1864), 17 Ia. 303; *Roxborough v. Messick* (1856), 6 O. St. 448.

**Pledge or lien.** other consideration, upon the ground, that by assuming the responsibilities of a party to the instrument (*infra*), he has become a holder for value.<sup>1</sup> But in courts denying this last position, the person taking accommodation paper as collateral security for a pre-existing debt, is deemed a holder for value as against the mere fact that the paper was given for accommodation.<sup>2</sup>

The "discount" of a bill must be distinguished from the pledge or deposit of a bill as security.<sup>3</sup> A "discount" is a holder for full value.<sup>4</sup> The position of a pledgee is this: If he sue a third party he sues as trustee for the pledgor, as regards the difference between the amount he has advanced and the amount of the bill. If the pledgor could have sued on the bill, the pledgee can recover the whole. If the title of the pledgor is defective, the pledgee can recover the amount of his advance, provided he took the bill without notice (Cf. Art. 85).<sup>5</sup> Like any other bailee, the pledgee of a bill must use due diligence with reference to it, having regard to the peculiar nature of the thing bailed, *e. g.*, he must not part with it; he must if he can collect it at maturity; if he cannot, he must give the proper notices of dishonor.<sup>6</sup>

**Banker's Lien.**—A lien is "an implied pledge."<sup>7</sup> A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking

<sup>1</sup> *Swift v. Tyson* (1842), 16 Pet. (U. S.) 1; *Brooklyn City Ry. Co. v. Nat. Bank* (1880), 102 U. S. 14; *Peacock v. Pursell* (1863) 14 C. B. N. S. 728; *Fisher v. Fisher* (1867), 98 Mass. 303; *Manning v. McClure* (1865), 36 Ill. 490; *First Nat. Bank v. Beaird* (1878), 3 Bradw. (Ill.) 239; *Robinson v. Smith* (1859), 14 Cal. 94; *Outwite v. Porter* (1865), 13 Mich. 533; *Cobb v. Doyle* (1863), 7 R. I. 550. *Con'ra*, *Bay v. Coddington* (1821), 5 Johns. Ch. (N. Y.) 54; *Stalker v. M'Donald* (1843), 6 Hill. (N. Y.) 93; *Comstock v. Hier* (1878), 73 N. Y. 269; *Roxborough v. Messick* (1856), 6 O. St. 448; *Jenkins v. Schaub* (1861), 14 Wis. 1; *Trustees v. Hill* (1861), 12 Ia. 462; *Royer v. Bank* (1877), 83 Pa. St. 248; *Davis v. Carson* (1879), 69 Mo. 609.

<sup>2</sup> *Grocer's Bank v. Penfield* (1877), 69 N. Y. 502; *Maitland v. Bank* (1874), 40 Md. 540; *Cummings v. Boyd* (1877), 83 Pa. St. at 376. *Contra*, *Bramhall v. Beckett* (1850), 31 Me. 205.

<sup>3</sup> *Ex parte Twogood* (1812), 19 Ves. 229; *Re Gomersall* (1876), 1 L. R. Ch. D. at 142; *Ex parte Schofield* (1879), 12 Ch. D. 357, C. A. (Bills indorsed "pending discount.")

<sup>4</sup> *Id.*; Cf. *Thiedman v. Goldsmidt* (1859), 1 DeG. F. & J. at 11; *Vinton v. Peck* (1866), 14 M. ch. 287; *Murphy v. Lucas* (1877), 58 Ind. 860; *Lay v. Wissman* (1873), 36 Ia. 305. But see *Todd v. Shelbourne* (1876), 8 Hun (N. Y.) 510; *Holcomb v. Wyckoff* (1871), 35 N. J. L. 35.

<sup>5</sup> *Reid v. Furnival* (1833), 1 Cr. & M. 533; *Logan v. Cassell* (1879), 88 Pa. St. 288; *Tooke v. Neuman* (1874), 75 Ill. 215; *Best v. Crall* (1880), 23 Kans. 482.

<sup>6</sup> *Peacock v. Pursell* (1863), 14 C. B. N. S. 728. But Cf. *Westphal v. Ludlow* (1881), 6 Fed. Rep. 348.

<sup>7</sup> *Brandao v. Barnett* (1846), 3 C. B. at 531, H. L.

business in respect of any balance that may be due from Pledge or such customer.<sup>1</sup> If the banker knows that the bills do not <sup>lien.</sup> belong to his customer, no lien can attach.<sup>2</sup> A broker who deals in bills has a lien similar to a banker's.<sup>3</sup> The terms on which securities are deposited may, of course, be such as to create a particular lien to the exclusion of the general lien.<sup>4</sup>

Art. 85. A "*bona fide* holder for value without notice" is a holder for value who, at the time he be- <sup>*Bona fide* holder for value without notice.</sup> comes the holder and gives value, is really and truly without notice of any facts which, if known, would defeat his title to the bill.<sup>5</sup>

## ILLUSTRATIONS.

1. C., the holder of a bill payable to his order, transfers it to D. for value, but without indorsing it. C. has obtained this bill by fraud, but D. has no notice of this. D. is not a *bona fide* holder.<sup>6</sup>

2. C., who resides abroad, transmits to D., his agent in England, a bill for collection. C. has obtained this bill by fraud, but D. does not know it. At the time D. receives the bill, C. is indebted to him on the balance of account. D. is not a *bona fide* holder for value. He cannot recover on the bill—*aliter* if C. had transmitted the bill to D. in payment of his debt.<sup>7</sup>

3. C. indorses to D. a bill for \$100, to be paid for by two instalments of \$50. At the time D. gets the bill he pays one instalment. Before D. pays the second instalment, he receives notice that C. obtained the bill by fraud. D. subsequently pays the second instalment. D. is a *bona fide* holder to the

<sup>1</sup> *Brandao v. Barnett* (1846), 3 C. B. 519; *Johnson v. Robarts* (1875), 10 L. R. Ch. 505; *Currie v. Misa* (1876), 1 L. R. Ap. Ca. at 569, H. L.; *Morris v. Preston* (1879), 93 Ill. 215; Cf. *Wood v. Boylston Nat. Bank* (1880), 129 Mass. 358.

<sup>2</sup> *Ex parte Kingston* (1871), 6 L. R. Ch. 632. But Cf. *Dickerson v. Wason* (1872), 47 N. Y. 439.

<sup>3</sup> *Jones v. Peppercorn* (1858), *John*. 430.

<sup>4</sup> *Re Bowes* (1886), 33 Ch. D. 586.

<sup>5</sup> *Raphael v. Bank* (1855), 17 C. B. 161; Cf. *Whistler v. Forster* (1863), 14 C. B. N. S. at 258; Art. 86.

<sup>6</sup> Art. 104; *Whistler v. Forster* (1863), 14 C. B. N. S. at 258; Cf. *Trust Co. v. Bank* (1879), 101 U. S. 68.

<sup>7</sup> *De la Chaumette v. Bank* (1829), 9 B. & C. 208, as explained by *Currie v. Misa* (1875), 10 L. R. Ex. at 164, Ex. Ch.; and *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. at 114.

*Bona fide*  
holder for  
value without  
notice.

extent of \$50 only, and that is the sum he is entitled to recover on the bill.<sup>1</sup>

NOTE.—The terms "*bona fide* holder," "innocent indorsee," etc., are used in the cases as synonymous with "*bona fide* holder for value without notice." The British Code, § 29, has substituted the phrase "holder in due course." The French equivalent, "*tiers porteur de bonne foi*," *i. e.*, "third party holder in good faith," well expresses the idea.

Notice.

Art. 86. Notice means actual notice—*i. e.*, either knowledge of the facts or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge.<sup>2</sup> If, as a fact, a bill is taken for value and without notice, it is immaterial that the holder took it under circumstances which show gross negligence.<sup>3</sup>

#### ILLUSTRATION.

D., the holder of a bill indorsed in blank, transfers it to E. for value. E. suspects that D. had obtained the bill by a false representation, and consequently makes no inquiries. As a fact, D. stole the bill. E. is not a *bona fide* holder; he is affected with notice.<sup>4</sup>

*Exception.*—The fact that a bill is overdue (Art. 134), or that there is an irregularity patent on the face of it (Art. 138), operates as notice.

NOTE.—*Test of bona fides.*—This has varied greatly. Previous to 1820 the law was much as at present, but, under the influence of Lord Tenterden, due care and caution was made the test.<sup>5</sup> In 1834 the King's Bench held that nothing short of gross negligence could defeat the title of a holder for value.<sup>6</sup>

<sup>1</sup> *Dresser v. Missouri Co.* (1876), 93 U. S. 92; Cf. *Hubbard v. Chapin* (186 ), 2 Allen (Mass.), 328.

<sup>2</sup> *Raphael v. Bank* (1855), 17 C. B. at 174; *Oakley v. Oodeen* (1861), 2 F. & F. at 659; *Re Gomersall* (1875), 1 L. R. Ch. D. at 144.

<sup>3</sup> *Goodman v. Harvey* (1836), 4 A. & E. at 876; *Swan v. North British Co.* (1863), 2 H. & C. at 184, 185; *Goodman v. Simonds* (1857), 20 How. (U. S.) 343.

<sup>4</sup> Cf. *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. at 628, H. L.; *Parsons v. Jackson* (1878), 99 U. S. 434.

<sup>5</sup> *Gill v. Cubitt* (1824), 3 B. & C. 466.

<sup>6</sup> *Crook v. Jadis* (1834), 5 B. & Ad. 909.

Two years later, Lord Denman states it as settled law that bad Notice faith alone could disentitle a holder for value. Gross negligence might be evidence of bad faith, but was not conclusive of it.<sup>1</sup> This principle has never since been shaken in England, and it seems now finally established in America.<sup>2</sup>

*Principal and Agent.*—As regards the parties affected with notice the ordinary rules of law apply to bills. Notice to the principal is notice to the agent, and notice to the agent is notice to the principal, subject to this: when the agent is himself a party to a fraud, he is not to be taken to have disclosed it to his principal.<sup>3</sup> Again, when a bill is negotiated to an agent and notice is given to the principal, or *vice versa*, there must be a reasonable time for communication.<sup>4</sup>

Art. 87. A holder who derives his title to a bill through a *bona fide* holder for value without notice has all the rights of such *bona fide* holder against the acceptor and all prior parties, although he himself may have given no value, and may be affected with notice.<sup>5</sup> Cf. Arts. 83 (Expl. 4), 134 (Expl. 2).

Holder claiming under *bona fide* holder.

#### ILLUSTRATIONS.

1. C., a partner in a firm, fraudulently indorses a firm bill to D. in payment of a private debt. F. is cognizant of the fraud, but is not a party to it. D. indorses the bill to E., who takes it for value and without notice. E. indorses it to F. F. acquires E.'s rights. If he gave value to E., he can sue all the parties to the bill; if he did not give value, he can sue all parties except E.<sup>6</sup>

2. C., by fraud, induces B. to make a note in his favor. C.

<sup>1</sup> *Goodman v. Harvey* (1836), 4 A. & E. at 876; *Goodman v. Simonds* (1857), 20 How. (U. S.) 343.

<sup>2</sup> *Murray v. Lardner* (1864), 2 Wall. (U. S.) 110; *Collins v. Gilbert* (1876), 94 U. S. 753; *Furrell v. Loret* (1878), 68 Me. 326; *Worcester Bank v. Bank* (1852), 10 Cush. (Mass.) 488; *Chapman v. Rose* (1874), 56 N. Y. at 140, *Howery v. Eppinger* (1876), 34 Mich. 29; *Johnson v. Way* (1875), 27 O. St. 374; *Shreeves v. Allen* (1875), 79 Ill. 553; *Kelley v. Whitney* (1878), 45 Wis. 110. *Contra*, only in Tenn., *Merritt v. Duncan* (1872), 7 Heisk. 156.

<sup>3</sup> *Ex parte Oriental Bank* (1870), 5 L. R. Ch. 358.

<sup>4</sup> Cf. *Willis v. Bank* (1835), 4 A. & E. at 39.

<sup>5</sup> *May v. Chapman* (1847), 16 M. & W. 355 at 361; *Masters v. Ibber-son* (1849), 8 C. B. 100; *Com'rs v. Clark* (1876), 94 U. S. 278; *Woodworth v. Huntoon* (1865), 40 Ill. 131; *Mowyer v. Cooper* (1872), 35 Ia. 257.

<sup>6</sup> *Id.*



Holder claim-  
ing under *bona*  
*fide* holder.

indorses the note to D., who takes it for value and without notice. Subsequently D. indorses the note for value back to C. C. cannot sue B.<sup>1</sup>

Immediate and  
remote parties.

Art. 88. Any defense available against an immediate party is available against a remote party who is in privity with such immediate party.

*Explanation 1.*—"Immediate parties" are parties in direct relation with each other. All other parties are remote. *Prima facie*, the drawer and the acceptor, the drawer and the payee, the indorser and his indorsee, are in direct relation.

#### ILLUSTRATIONS.

1. A. draws a bill on B. payable to C., and delivers it to the latter. B. accepts the bill while in C.'s hands. B. and C. are remote parties.<sup>2</sup>

2. B. makes a note payable to C. *Prima facie*, B. and C. are immediate parties; but if it appear that B. made the note at the request of X., under the belief that he had done something which he had not done, and that X. on his own account delivered the note to C., who gave value and took it without notice, then B. and C. are remote parties.<sup>3</sup> *Aliter* if X. had been C.'s agent.<sup>4</sup>

*Explanation 2.*—Privity is created in all cases by want of consideration, and in some cases by notice; it may also be created by agreement.

NOTE.—(1.) The holder of a bill who has not himself given value is, as regards third parties, deemed to be the agent of the party from whom he received it, whatever their private relations may be.<sup>5</sup> (2.) Notice creates privity when it is notice of

<sup>1</sup> Cf. *Sawyer v. Wisewell* (1864), 9 Allen (Mass.), at 42; *Calhoun v. Albin* (1871), 48 Mo. 304.

<sup>2</sup> *Robinson v. Reynolds* (1841), 2 Q. B. 196, Ex. Ch..

<sup>3</sup> Cf. *Watson v. Russell* (1862), 3 B. & S. 34; *Lea v. Cassen* (1878), 61 Ala. 312.

<sup>4</sup> *Astley v. Johnson* (1860), 5 H. & N. 137.

<sup>5</sup> Cf. *Fitch v. Jones* (1855), 5 E. & B. at 246, and cases cited in Art. 97; also, *Lee v. Hayes* (1865), 17 Ir. C. L. at 408.

defective *title* in the party from whom the bill is taken, *i. e.*, Immediate and notice that he had no right to hold the bill or no right to part <sup>remote parties.</sup> with it.<sup>1</sup> Title to a bill must be distinguished from the right to enforce payment of it against particular parties—*e. g.*, the donee of a bill has a good title though he could not enforce payment against the donor.<sup>2</sup> Whenever a bill is held adversely to the true owner, and there is privity between the true owner and the *de facto* holder, a third party, if sued, may set up the *jus tertii*.<sup>3</sup> (3.) Again, when a person expressly or impliedly agrees to hold a bill as agent or trustee for another person, he holds it subject to all defenses against the person for whom he holds, irrespective of the state of accounts between them.<sup>4</sup>

Art. 89. Every party to a bill is *prima facie* <sup>Presumption of value.</sup> deemed to have become a party thereto for value.<sup>5</sup>

### *Accommodation Bill.*

Art. 90. "Accommodation bill" means a bill where- <sup>Accommodation bill or party.</sup> of the acceptor (*i. e.*, the principal debtor on the instrument) is substantially a mere surety for some other person who may or may not be a party thereto.<sup>6</sup>

"Accommodation party" means a person who has signed a bill as drawer, indorser, or acceptor, without receiving value, *and* for the purpose of lending his name to some other person, as a means of credit.

### ILLUSTRATIONS.

1. A. draws a bill on B. B. accepts it to accommodate A. It is negotiated. This is an accommodation bill.<sup>7</sup>

2. A. draws and indorses, and B. accepts, a bill for the accommodation of X., who is not a party thereto. A. and B. receive a commission for so doing. This is an accommodation bill.<sup>8</sup>

<sup>1</sup> See, *e. g.*, Arts. 23, 54, 55, 134.

<sup>2</sup> See, *e. g.*, Art. 83, Expl. 4, and Arts. 91, 134, 141.

<sup>3</sup> See, *e. g.*, Arts. 55 and 94.

<sup>4</sup> *De la Chaumette v. Bank* (1829), 9 B. & C. 208, as explained, *Currie v. Misa* (1875), 10 L. R. Ex. at 164, Ex. Ch.

<sup>5</sup> Cf. *Hatch v. Traves* (1840), 11 A. & E. 702; *Foster v. Dwyer* (1851), 6 Exch. at 853; *Townsend v. Derby* (1841), 3 Met. 363; *Adams v. Adams* (1878), 25 Minn. 72.

<sup>6</sup> Cf. *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. at 146, 151; 7 L. R. H. L. at 358; *Ex parte European Bank* (1871), 7 L. R. Ch. 99.

<sup>7</sup> *Collott v. Haigh* (1812), 3 Camp. 281.

<sup>8</sup> *Oriental Corp. v. Overend*, *supra*.

Accommodation bill or party.

3. A. draws a bill on B. against a running account. B. accepts. This is not an accommodation bill, although the balance may have been against A. when the bill was drawn or accepted, or payable.<sup>1</sup>

4. A. draws a bill on B. in favor of C. It appears that B. was indebted to C., and that A. drew the bill to accommodate B. This is not an accommodation bill, though A. is an accommodation drawer.<sup>2</sup>

5. A. draws a bill on B. B. accepts for value. C., whose name is well known, indorses the bill to give it currency. This is not an accommodation bill, but C. is an accommodation indorser.<sup>3</sup>

*Explanation.*—An accommodation party known to be such, may avail himself of any defense which the person accommodated could have set up.<sup>4</sup>

#### ILLUSTRATION.

B. and X. make a joint and several note payable to C. B. signs as maker to accommodate X. C. takes the note knowing this. If C. sue B., B. can set off a debt due from C. to X.<sup>5</sup>

*NOTE.*—A bill which is signed by one or more accommodation parties is frequently called an accommodation bill, but the definition given above is believed to be more strictly correct. The distinction becomes of importance when questions arise as to what is or is not a discharge of the bill, *e. g.*, payment by person accommodated, or the giving of time to such person. See, too, Arts. 168, 245.

Absence of value.

#### *Want of Consideration.*

Art. 91. Mere absence of consideration, total or partial, is matter of defense against an immediate party or a remote party, who is not a holder for value, but

<sup>1</sup> *Ex parte Swan* (1869), 6 L. R. Eq. at 356; Cf. *Wilks v. Hornby* (1862), 10 W. R. 742; *Farmers Bank v. Rathbone* (1852), 26 Vt. 19.

<sup>2</sup> *Scott v. Lifford* (1808), 1 Camp. 246; Cf. *Sleigh v. Sleigh* (1850), 5 Exch. 514.

<sup>3</sup> Cf. *Re Nunn* (1817), Buck. 113. Practice not uncommon in case of foreign bills: See *e. g.*, *Société Générale v. Bank* (1873), 27 L. T. N. S. 849.

<sup>4</sup> *Bechervaise v. Wight* (1872), 7 L. R. C. P. 372, at 377.

<sup>5</sup> *Id.*

it is not a defense against a remote party who is a holder for value.<sup>1</sup> Absence of  
value.

*Explanation.*—An accommodation party is liable to a holder for value, who takes a bill knowing him to be such.<sup>2</sup>

#### ILLUSTRATIONS.

1. B., by way of gift, makes a note in favor of C. C. cannot sue B.<sup>3</sup>

2. C., the holder of a bill for value, indorses it to D. by way of gift. The property in the bill passes to D., but he cannot sue C.<sup>4</sup>

3. A. draws a bill on B. for \$100. B. accepts it to accommodate A. A. discounts it with C., who knows that it is an accommodation bill. C. can sue A. or B. for \$100;<sup>5</sup> but if C., instead of discounting it, merely advanced \$50 on it, he can only recover \$50.<sup>6</sup> If C. discount the bill, and pledge it with D. for \$50, D. can recover \$100 from B., and he will hold \$50 thereof in trust for C.<sup>7</sup>

4. B. owes A. \$50. A. draws a bill on B. for \$100. B., to accommodate A., and at his request, accepts it. If A. sue B. he can recover only \$50.<sup>8</sup>

5. C. is D.'s agent abroad. C. purchases a bill for D. The bill is made payable to C.'s order, and he indorses it to D.

<sup>1</sup> Cf. *Forman v. Wright* (1851), 11 C. B. at 492; *Nowak v. Excelsior Stone Co.* (1875), 78 Ill. 307; *Woolen v. Vankirk* (1878), 61 Ind. 497.

<sup>2</sup> *Scott v. Lifford*, (1808), 1 Camp. 246; *Strong v. Foster* (1855), 17 C. B. at 822; *Petty v. Cooke* (1871), 6 L. R. Q. B. 790; *Thompson v. Shepherd* (1847), 12 Met. (Mass.), 311; *Winters v. Ins. Co.* (1870), 30 Ia. 172; Cf. Arts. 83, 90.

<sup>3</sup> *Holliday v. Atkinson* (1826), 5 B. & C. 501; Cf. *Hill v. Buckminster* (1827), 5 Pick. (Mass.) 390; *Cloyes v. Cloyes* (1885), 36 Hun. 145 (check).

<sup>4</sup> *Easton v. Pratchett* (1835), 1 C. M. & R. at 808; Cf. *Milnes v. Dawson* (1850), 5 Ex. Ch. 948.

<sup>5</sup> Cf. *Mills v. Barber* (1836), 1 M. & W. 425; *Sturtevant v. Ford* (1842), 4 M. & Gr. 101; *Fowler v. Strickland* (1871), 107 Mass. 552. *Contra. Holeman v. Hobson* (1847), 8 Humph. (Tenn.) 127.

<sup>6</sup> *Nash v. Brown* (1817), cited *Chitty*, p. 60; *Jones v. Hibbert* (1817), 2 Stark. 304; *Re Gomersall* (1875), 1 L. R. Ch. D. at 144; *Ex parte Newton* (1880), 16 Ch. D. 330, C. A. (proof); *Chicopee Bank v. Chapin* (1844), 8 Met. (Mass.) at 44.

<sup>7</sup> *Attlaire v. Hartshorne* (1847), 1 Zab. (N. J.) 665; *Hilton v. Smith* (1855), 5 Gray, (Mass.), at 402.

<sup>8</sup> *Darnell v. Williams* (1817), 2 Stark. 166. Cf. *Thomas v. Thomas* (1859), 7 Wis. 476.

Absence of  
value.

This is done merely for the purpose of safe transmission, and not to guarantee the bill. If the bill is dishonored, C. is not liable to D. as indorser.<sup>1</sup>

6. A. and C. supply goods to B. A. draws a bill on B. for the price, and indorses it to C. to collect on joint account. If the bill is dishonored, A. is not liable to C.<sup>2</sup>

7. B. accepts a bill drawn by A., to accommodate him. A. indorses it to C. without receiving value. C. indorses it to D. without receiving value. D. cannot recover from B., but it lies on B. to show that neither D. nor any intervening holder was a holder for value.<sup>3</sup>

### *Failure of Consideration.*

Total failure  
of value.

Art. 92. Total failure of consideration is a defense against an immediate party, but it is not a defense against a remote party who is a *bona fide* holder for value without notice.<sup>4</sup>

### ILLUSTRATIONS.

1. B. makes a note payable to C. The only consideration is that C. is to act as B.'s executor. C. dies first. His personal representatives cannot enforce payment against B.<sup>5</sup>

2. B. authorizes A. to draw on him against bills of lading. A. draws a bill on B. and indorses it to C. with the bill of lading attached. C. gives value to A. B. accepts the bill on receiving from C. the bill of lading. The bill of lading turns out to be a forgery, but C. did not know it when he obtained the acceptances. C. can sue B.<sup>6</sup>

3. A. draws a bill at three months on B., his agent, in favor of C., who agrees to pay therefor in seven days. B. accepts on A.'s account. C. does not pay A. for the bill. C. cannot sue B.<sup>7</sup>

<sup>1</sup> *Castrique v. Buttegieg* (1855), 10 Moore, P. C. 110; *Kimmell v. Bittner* (1869), 62 Pa. St. 203; Cf. *Re Nunn* (1817), Buck. 113.

<sup>2</sup> *Denton v. Peters* (1870), 5 L. R. Q. B. 475.

<sup>3</sup> *Mills v. Barber* (1836), 1 M. & W. 425; Cf. *Thompson v. Clubley* (1836), 1 M. & W. 212.

<sup>4</sup> *Robinson v. Reynolds* (1841), 2 Q. B. at 211, Ex. Ch.; *Aldrich v. Stockwell* (1864), 9 Allen (Mass.), 45; as to what amounts to total failure, *Wells v. Hopkins* (1839), 5 M. & W. 7; *Hooper v. Treffery* (1847), 1 Exch. 17.

<sup>5</sup> *Solly v. Hinde* (1834), 2 Cr. & M. 516.

<sup>6</sup> *Robinson v. Reynolds* (1841), 2 Q. B. 196, Ex. Ch.; Cf. *Craig v. Sibbett* (1850), 15 Pa. St. 238; *Leather v. Simpson* (1871), 11 L. R. Eq. 398.

<sup>7</sup> *Astley v. Johnson* (1860), 5 H. & N. 137.

4. A. draws a bill on B. payable to his own order. B. ac- Total failure  
cepts. The consideration between A. and B. fails. A. subse- of value.  
quently indorses the bill for value to C., who knows that the  
consideration between A. and B. has failed. C. cannot sue B.<sup>1</sup>

NOTE.—Failure of consideration, it seems, is a defense against a remote holder for value with notice. The reason probably is that it is in the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed.<sup>2</sup> But might there not be cases in which it would not be a fraud to do so? Again, *q. u.* as to the effect of failure of consideration after the maturity of the bill, *i. e.*, after a cause of action has accrued?<sup>3</sup> When the consideration for a bill fails, the court will usually restrain its negotiation by injunction.<sup>4</sup>

Art. 93. Partial failure of consideration is a de- Partial failure  
fense *pro tanto* against an immediate party when the of value.  
failure is an ascertained and liquidated amount, but  
not otherwise.<sup>5</sup> It is not a defense against a remote  
party who is a holder for value.<sup>6</sup>

#### ILLUSTRATIONS.

1. B. accepts a bill for \$100 drawn by A. This is the agreed price of goods to be supplied by A. to B. When the goods arrive they are found to be inferior to sample, and worth only \$80. B. retains the goods. If A. sue B. on the bill, this is not a defense *pro tanto*.<sup>7</sup>

2. B. accepts a bill for \$100. This is the agreed price of

<sup>1</sup> *Lloyd v. Davies* (1824), 3 L. J. K. B. 38; Cf. *Fairclough v. Paria* (1854), 9 Ex. Ch. 690 (same principle assumed); *Starr v. Torrey* (1849), 2 Zab. (N. J.) 190.

<sup>2</sup> Cf. *Oulds v. Harrison* (1854), 10 Ex. Ch. at 579.

<sup>3</sup> Cf. *Watson v. Russell* (1864), 5 B. & S. at 968.

<sup>4</sup> Cf. *Patrick v. Harrison* (1792), 3 Bro. C. C. 476; *Bainbridge v. Hemingway* (1865), 12 L. T. N. S. 74.

<sup>5</sup> *Day v. Nix* (1824), 9 Moore, 159; *Warwick v. Nairn* (1855), 10 Exch. 762; *Davis v. Bean* (1874), 114 Mass. 358; *Holzworth v. Koch* (1875), 26 O. St. 33. Defense though unliquidated, *Stacy v. Kemp* (1857), 97 Mass. 166; *Spalding v. Vandercook* (1829), 2 Wend. (N. Y.) 431; *Reese v. Gordon* (1861), 19 Cal. 147; *Peterson v. Johnson* (1867), 22 Wis. 21. And by statute in Colorado, Florida, Georgia, Illinois, Indiana, Iowa, New Hampshire and Texas.

<sup>6</sup> *Archer v. Namford* (1822), 3 Stark. 175; *Stevens v. Campbell* (1861), 13 Wis. 419; Cf. *Richards v. Betzer* (1870), 53 Ill. 466.

<sup>7</sup> *Glennie v. Imvi* (1839), 3 Y. & C. 436. *Contra*, cases *supra*.

Partial failure of value. two bales of cotton to be supplied by A. to B. A. only delivers one bale. A. indorses the bill to C., his agent, to collect. C. can only recover \$50.<sup>1</sup>

3. B. accepts a bill drawn by A. for \$100. This is the agreed price of two bales of cotton to be supplied by A. to B. When the cotton arrives, one bale is found to be inferior to sample and is returned as useless. A. indorses the bill to C. without value. If C. sues B. he can only recover \$50, the price of the one bale which is kept.<sup>2</sup>

NOTE.—In some cases of partial failure of consideration, the Court would (perhaps) restrain the holder from negotiating the bill after notice.<sup>3</sup>

Fraud or duress.

### *Fraud or Duress.*

Art. 94. Fraud is a defense against an immediate party and against a remote party who is not a *bona fide* holder for value without notice.<sup>4</sup>

*Explanation 1.*—A bill is affected with fraud when the issue or any subsequent negotiation of it is obtained by fraud,<sup>5</sup> or coercion,<sup>6</sup> or when it is negotiated in breach of faith,<sup>7</sup> or in fraud of third parties.<sup>8</sup>

*Explanation 2.*—The holder of a bill subsequent to a fraud, who is not a *bona fide* holder for value without notice, cannot enforce payment against any

<sup>1</sup> Cf. *Agra Bank v. Leighton* (1866), 2 L. R. Ex. at 64, 65.

<sup>2</sup> *Id.*

<sup>3</sup> Cf. *Jacobson v. Shanks* (1866), 12 Jur. N. S. 917.

<sup>4</sup> Arts. 85 and 137; *Whistler v. Forster* (1863), 14 C. B. N. S. at 258; *Fisher v. Leland* (1849), 4 Cush. (Mass.) 456.

<sup>5</sup> *Wienholt v. Spitta* (1813), 3 Camp. 376; *Dawes v. Harness* (1875), 10 L. R. C. P. 166; *Von Windisch v. Klaus* (1878), 46 Conn. 433. But no defense if defendant retains any part of the consideration, *Heaton v. Knowlton* (1876), 53 Ind. 357.

<sup>6</sup> As to duress, *Duncan v. Scott* (1807), 1 Camp. 100 (*onus probandi*); *Kearns v. Durrell* (1857), 6 C. B. 596; *Heysham v. Dettre* (1879), 89 Pa. St. 506; *Loomis v. Ruck* (1874), 56 N. Y. 462; *Barnes v. Stevens* (1878), 62 Ind. 226; *Segrum v. Prescott* (1879), 69 Me. 376.

<sup>7</sup> *Lloyd v. Howard* (1850), 15 Q. B. 995; *Barber v. Richards* (1851), 6 Exch. 63; *Gage v. Sharp* (1867), 24 Ia. 15; Cf. Art. 55. As to diversion of accommodation paper, *Nickerson v. Ruger* (1879), 76 N. Y. 279; *Reed v. Trentman* (1876), 53 Ind. 438.

<sup>8</sup> *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 616, H. L.; *Fay v. Fay* (1877), 121 Mass. 561; *Bastian v. Dreyer* (1879), 7 Mo. Ap. 332.

party thereto, neither can he retain the bill against the true owner.<sup>1</sup> Fraud or duress.

NOTE.—When the consideration for a bill is clearly fraudulent, and it is in the hands of a party with notice, the Court will order it to be given up at once.<sup>2</sup> When only a *prima facie* case of fraud is made out, the Court will restrain the negotiation of the bill for a specified time, in order that the question may be tried.<sup>3</sup>

Where a party sued on a bill sets up the *jus tertii*, *e. g.*, if the acceptor, when sued by an indorsee, sets up that the indorsee obtained the bill by fraud from his immediate indorser, it seems the nature of the fraud must also be looked at. If the indorser never intended by his indorsement to pass the property in the bill to the indorsee, the *jus tertii* alone is a good defense;<sup>4</sup> but if the indorser intended to pass the property in the bill to the indorsee, though he was induced to do so by fraud, it seems the acceptor must go on to show that the indorsee has disaffirmed the transaction;<sup>5</sup> for fraud renders a contract voidable, not void.

### *Illegal Consideration.*

Art. 95. Illegality of consideration, total or partial,<sup>6</sup> is a defense *in toto* against an immediate party or a remote party who is not a *bona fide* holder for value without notice.<sup>7</sup> Illegal consideration.

*Explanation.*—The consideration for a bill is illegal when it is wholly or in part immoral, contrary to public policy, or forbidden under penalties by statute.<sup>8</sup>

<sup>1</sup> *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 616, H. L.; *Lloyd v. Howard*, (1850), 15 Q. B. 995; *Alsager v. Chase* (1842), 10 M. & W. 576.

<sup>2</sup> *Joyce on Injunctions*, p. 369; and see *Jones v. Lane* (1829), 3 Y. & C. at 293.

<sup>3</sup> *Id.*

<sup>4</sup> *Lloyd v. Howard*, *supra*; *Barber v. Richards* (1851), 6 Exch. 63.

<sup>5</sup> *Dawes v. Harness* (1875), L. R. 10 C. P. 166. So held in America, *Prouty v. Roberts* (1850), 6 Cush. (Mass.) 19; *Carrier v. Sears* (1862), 4 Allen (Mass.), 336.

<sup>6</sup> *Perkins v. Cummings* (1854), 2 Gray (Mass.), 258; *Wisner v. Bardwell* (1878), 38 Mich. 278; *Widoe v. Webb* (1870), 20 O. St. 431. Rule modified, *Warren v. Chapman* (1870), 105 Mass. 87; *Doty v. Bank* (1865), 16 O. St. 133. Cf. Art. 93.

<sup>7</sup> *Hay v. Ayling* (1851), 16 Q. B. at 431; *Scollans v. Flynn* (1876), 120 Mass. 271; *Shirley v. Howard* (1870), 53 Ill. 455; *Atwood v. Weedon* (1879), 12 R. I. 293.

<sup>8</sup> Cf. *Fitch v. Jones* (1855), 5 E. and B. 238; *Daniel*, § 195; *Fareira v. Gabell* (1879), 89 Pa. St. 89 (stock gambling contract).



## ILLUSTRATION.

Illegal consideration.

Bill to the drawer's order accepted for value. The drawer indorses to C. for an illegal consideration, *e. g.*, to stifle a prosecution for felony. C. can, it seems, sue the acceptor,<sup>1</sup> but not the drawer.

NOTE.—It is important to notice whether the consideration was simply illegal or whether it was a consideration which by statute expressly made the bill void.<sup>2</sup> Thus, in a recent case a check was held valid in the hands of a *bona fide* transferee, though given upon a wager as to whether an execution could be collected, the wager being considered void as against public policy, but not as within the statutory prohibition against gaming.<sup>3</sup> Again, an illegal consideration must be distinguished from a merely void consideration.<sup>4</sup> In America it has been held that if B., for value, make a note payable to C., and C. for an illegal consideration indorse it to D., then D. can sue B., though he could not sue C.<sup>5</sup> Although the party sued may in many instances set up the *jus tertii*, the cases cited serve to show that he cannot set up the *injuria tertii* as a defense. A proceeding prohibited by statute must be distinguished from a proceeding which is merely unauthorized.<sup>6</sup>

Bills void by statute.

Art. 96. When a bill is given for a consideration which by statute expressly makes it void, it is as against the party who gave it void, in the hands of all parties; whether immediate or remote.<sup>7</sup>

## ILLUSTRATION.

A. draws a bill on B. payable to his own order. B. accepts it for a consideration, which by statute avoids it. A. indorses it to C., who takes it for value and without notice. C. can sue A.,<sup>8</sup> but he cannot sue B.<sup>9</sup>

<sup>1</sup> *Flower v. Sadler* (1882), 10 Q. B. D. 572, C. A.

<sup>2</sup> *Oates v. Bank* (1879), 100 U. S. at 349.

<sup>3</sup> *Boughner v. Meyer* (1879), 5 Col. 71; S. C., 40 Am. R. 139.

<sup>4</sup> *Fitch v. Jones*, (1855), 5 E. & B. 238; *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

<sup>5</sup> *Armstrong v. Gibson* (1872), 31 Wis. 66; *Knight v. Putnam* (1825), 3 Pick. (Mass.) at 185. *Contra, Nichols v. Fearson* (1833), 7 Pet. (U. S.) 103.

<sup>6</sup> *Re Coltman* (1881), 19 Ch. D. 64 C. A.

<sup>7</sup> *Edwards v. Dick* (1821), 4 B. & Ald. 212; *Towne v. Rice* (1877), 122 Mass. at 71; *Aurora v. West* (1864), 22 Ind. 88; *Eagle v. Kohn* (1876), 84 Ill. 292; *Cowing v. Altman* (1877), 71 N. Y. 435.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; *Reed v. Wiggins* (1862), 13 C. B. N. S. 220.

NOTE.—Both in England and America, it is no longer the policy of the law to declare a note expressly void by statute, and where such statutes exist, a clause is often inserted, saving the rights of an innocent holder. Usury laws still exist in some of the States, but they are becoming obsolete, and questions under such statutes arise less frequently.

### *Presumption of Value.*

Art. 97. The holder of a bill is *prima facie* deemed to be a *bona fide* holder for value without notice;<sup>1</sup> but if in an action on a bill it is admitted or there is evidence<sup>2</sup> that the issue or subsequent negotiation of such bill is affected with fraud or illegality, the *onus probandi* as to value is shifted, and the holder is called upon to prove that he is a holder for value.<sup>3</sup>

### ILLUSTRATIONS.

1. A. draws a bill on B. and indorses it to C. C. sues B. It is shown that B. accepted it for A.'s accommodation. C. is not called on to prove that he gave value; he can recover without so doing.<sup>4</sup> *Aliter*, if a fraudulent diversion of the paper is shown.<sup>5</sup>

2. B. makes a note payable to C. C. indorses it to D., who sues B. If it appears that B. made the note for an illegal consideration, D. must prove that he gave value.<sup>6</sup>

3. The holder of a bill indorses it to D. to get it discounted. D. fraudulently negotiates it to E., who negotiates it to F. F.

<sup>1</sup> *King v. Milsom* (1809), 2 Camp. 6; *Collins v. Gilbert* (1876), 94 U. S. 753; *Root v. Cook* (1876), 81 Ill. 261; *Hall v. Allen* (1871), 37 Ind. 541. But this *prima facie* presumption does not shift the burden of proof which remains on the plaintiff, *Delano v. Bartlett* (1850), 6 Cush. (Mass.) 364; *Small v. Clewley* (1871), 62 Me. 155; *Atlas Bank v. Doyle* (1868), 9 R. I. 76.

<sup>2</sup> *Hall v. Featherstone* (1858), 3 H. & N. at 286 (evidence to go to a jury).

<sup>3</sup> *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. at 627, 628. H. L.; *Conley v. Winsor* (1879), 41 Mich. 234; *Sistermans v. Field* (1857), 9 Gray (Mass.) 331; *Sperry v. Spalding* (1873), 45 Cal. 544.

<sup>4</sup> *Mills v. Barber* (1836), 1 M. & W. 425; *Harger v. Worrall* (1877), 69 N. Y. 370; *Dingham v. Amsink* (1874), 77 Pa. St. 114. But Cf. *Merchants Bank v. N. B. Sav. Inst.* (1868), 33 N. J. L. 170.

<sup>5</sup> *Nickerson v. Ruger* (1879), 76 N. Y. 279.

<sup>6</sup> *Bailey v. Bidwell* (1844), 13 M. & W. 73; *Bottomley v. Goldsmith* (1877), 36 Mich. 27; *Emerson v. Burns* (1874), 114 Mass. 318.

Presumption  
of value and  
*bona fides*  
may shift.

sues the acceptor. Evidence is given of D.'s fraud. F. must prove that he is a holder for value.<sup>1</sup>

4. B. makes a note payable to C., the consideration for which is a wager, i. e., a consideration void by statute, but not prohibited under a penalty. C. indorses it to D. who sues B. Evidence is given of these facts. D. is not called on to prove that he gave value.<sup>2</sup>

5. Action against the maker of a note payable to bearer. It is shown to have been stolen from the true owner. It lies on the holder to prove that he gave value.<sup>3</sup>

6. An acceptance is given in renewal of a bill which turns out to be a forgery. The genuine bill is negotiated, and the holder sues the acceptor. Evidence is given of these facts. It lies on the holder to prove that he is a holder for value.<sup>4</sup>

7. A partner accepts a bill in the firm's name for a private debt and in fraud of his copartners. The bill is negotiated. The holder sues the firm as acceptors. As soon as it appears that the bill was given for a private debt, the holder is called upon to prove that he is a holder for value.<sup>5</sup>

NOTE.—If the holder show that he is a holder for full value, the defendant must give evidence that the plaintiff took the bill with notice, for the giving of value raises a *presumption* of good faith;<sup>6</sup> but the plaintiff has the *burden of proof* that he is a holder for value and in good faith.<sup>7</sup> In America it is held that if the holder has in good faith given partial value, he may recover *pro tanto*.<sup>8</sup> Probably the same would be held in England.

<sup>1</sup> Cf. *Smith v. Braine* (1851), 16 Q. B. 244; *Berry v. Alderman* (1853), 14 C. B. 95.

<sup>2</sup> *Fitch v. Jones* (1855), 5 E. & B. 238.

<sup>3</sup> *Raphael v. Bank* (1855), 17 C. B. 161; *Robinson v. Hodgson* (1873), 73 Pa. St. 202. Except bank notes, *Wyer v. Bank* (1853), 11 Cush. (Mass.) 51.

<sup>4</sup> *Mather v. Maidstone* (1856), 1 C. B. N. S. 273.

<sup>5</sup> *Hogg v. Skeen* (1865), 18 C. B. N. S. 426; *Bank v. Gilliland* (1840), 23 Wend. (N. Y.) 311.

<sup>6</sup> *Raphael v. Bank*, *supra*; *Murray v. Lardner* (1864), 2 Wall. (U. S.) 110; *Dalrymple v. Hillenbrand* (1875), 62 N. Y. 5, 11; *Davis v. Bartlett* (1861), 12 O. St. 541.

<sup>7</sup> *Kellogg v. Curtis* (1879), 69 Me. 212; Cf. *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. at 628; *Smith v. Lirington* (1873), 111 Mass. 342.

<sup>8</sup> *Holcomb v. Wyckoff* (1870), 35 N. J. L. 35; *Dresser v. Missouri Co.* (1876), 93 U. S. 92.

## CHAPTER IV.

### TRANSFER.

#### *Transmission by Act of Law.*

Art. 98. If a bill be held by an unmarried woman <sup>Marriage</sup> who subsequently marries, or if a bill be made payable or be indorsed to a married woman, the title thereto vests in the husband, provided he reduce it into possession.<sup>1</sup>

*Explanation 1.*—If the husband dies without having reduced the bill into possession, the title thereto reverts to the wife if she be alive, and passes to her personal representatives if she dies before her husband.<sup>2</sup>

*Explanation 2.*—During the marriage, the husband is for all purposes deemed to be the holder of a bill payable to the order of his wife, whether it was made payable to her before or after the marriage.<sup>3</sup>

#### ILLUSTRATIONS.

1. Bill payable to the order of C., a single woman. C. marries D. C., after marriage, indorses the bill to E. without

<sup>1</sup> Cf. *Fleet v. Perrins* (1868), 3 L. R. Q. B. at 541, affirmed 4 L. R. Q. B. 500; *Commonwealth v. Manley* (1831), 12 Pick. (Mass.) 173. As to what is or is not a reduction of bill into possession: Cf. *Nash v. Nash* (1817), 2 Mad. 183; *Sherrington v. Yates* (1844), 12 M. & W. 855, esp. at 865, Ex. Ch.; *Hart v. Stephens* (1845), 6 Q. B. 937; *Scarpelini v. Atcheson* (1845), 7 Q. B. at 875-876; *Latourette v. Williams* (1847), 1 Barb. (N. Y.) 9.

<sup>2</sup> *Hart v. Stephens*, *supra*; *Draper v. Jackson* (1820), 16 Mass. 480; *Williams on Executors*, 7 ed., pp. 848-852.

<sup>3</sup> Cf. *McNeillage v. Holloway* (1818), 1 B. & Ald. 218.

**Marriage.** her husband's consent. The indorsement is invalid,<sup>1</sup> but D. could validly indorse the bill, using his own name.<sup>2</sup>

2. A note is made payable to the order of C., a married woman. Her husband indorses it in his own name. This is a valid indorsement.<sup>3</sup>

**NOTE.**—When a bill is made payable to the order of a married woman, the husband may sue on it in his own name alone, or if he likes he may join his wife.<sup>4</sup> When a bill is payable to the order of a single woman, who subsequently marries, both husband and wife should join in an action on it; but it has been held that the husband may sue alone.<sup>5</sup>

**Exception.**—Bill forming part of wife's separate estate.<sup>6</sup>

**NOTE.**—The rules of the common law as to a married woman as stated in this Article, have been materially modified by statutes in most of the American States, conferring upon her all the rights of a *feme sole*, except as to contracts with her husband.

**Death.**

**Art. 99.** On the death of the holder of a bill the title thereto passes to his personal representatives (executors or administrators, as the case may be).<sup>7</sup>

#### ILLUSTRATIONS.

1. C., the holder of a bill payable to order, dies. His administrator, as such, can enforce payment of it or indorse it away, using his own name.<sup>8</sup>

2. C., the holder of a bill payable to order, dies, having

<sup>1</sup> *Connor v. Martin* (1746), cited 3 Wils. at 5; *Savage v. King* (1840), 17 Me. 301.

<sup>2</sup> *Roberts v. Place* (1846), 18 N. H. 183.

<sup>3</sup> *Mason v. Morgan* (1834), 4 N. & M. 46; Cf. *Smith v. Marsack* (1848), 6 C. B. 486 at 503.

<sup>4</sup> *Fleet v. Perrins* (1868) 3 L. R. Q. B. at 541.

<sup>5</sup> *McNeillage v. Holloway* (1818), 1 B. & Ald. 218; but Cf. *Sherrington v. Yates* (1844), 12 M. & W. at 865, Ex. Ch.; *Morse v. Earl* (1835), 13 Wend. (N. Y.) 271.

<sup>6</sup> *Green v. Carhill* (1877), 4 L. R. Ch. D. 882, and Arts. 65, 66; Cf. Art. 81, Excep. 2.

<sup>7</sup> *Clark v. Sigourney* (1846), 17 Conn. 511; *Mitchell v. Dickson* (1876), 53 Ind. 110.

<sup>8</sup> *Rawlinson v. Stone* (1746), 3 Wils. 1 Ex. Ch.; *Makepeace v. Moore* (1849), 5 Gilm. (Ill.) 474; *Hersey v. Elliot* (1878), 67 Me. 526.

specifically bequeathed it to X. X. can not sue on it or indorse Death. it away, unless he first obtain an indorsement of the bill to him by C.'s executor.<sup>1</sup>

NOTE.—An executor or administrator who indorses a bill should, in express terms, exclude personal liability, Cf. Art. 76; and as he is not the agent of the deceased he cannot by his delivery complete an indorsement written by the latter. He must indorse it *de novo*; Art. 54. When there are two or more executors, the indorsement of one is probably sufficient to transfer the property in the bill.<sup>2</sup>

Art. 100. Upon the death of a joint payee or indorsee of a bill, the title thereto vests at once in the survivor or survivors.<sup>3</sup>

### *Transfer by Assignment.*

Art. 103. A bill may be transferred by assignment <sup>Assignment</sup> or sale, <sup>or sale.</sup> subject to the same conditions that would be requisite in the case of an ordinary chose in action.

### ILLUSTRATION.

C. is the holder of a note payable to his order. He may transfer his title to D. by a separate writing assigning the note to D.,<sup>4</sup> or by a voluntary deed constituting a declaration of trust in favor of D.,<sup>5</sup> or by a written contract of sale.<sup>6</sup>

NOTE.—A bill is a chattel, therefore it may be sold as a chattel. A bill is a chose in action, therefore it may be assigned as a chose in action. It is clear that a subsequent title under the law merchant would override a prior title under a

<sup>1</sup> *Crist v. Crist* (1849), 1 Cart. (Ind.) 570.

<sup>2</sup> *Wheeler v. Wheeler* (1828), 9 Cow. (N. Y.) 34; *Dwight v. Newell* (1854), 15 Ill. 383.

<sup>3</sup> Cf. *Russell v. Swan* (1820), 16 Mass. at 316; *Allen v. Tate* (1881), 58 Miss. 585.

<sup>4</sup> *Re Barrington* (1804), 2 Scho. & Lef. 112; *Franklin v. Twogood* (1865), 18 Ia. 515; *French v. Turner* (1860), 15 Ind. 59.

<sup>5</sup> *Richardson v. Richardson* (1867), 3 L. R. Eq. 686; Cf. *Burrows v. Krays* (1877), 37 Mich. 431.

<sup>6</sup> *Sheldon v. Parker* (1874), 3 Hun (N. Y.), 498.

Assignment  
or sale.

sale or assignment according to the general law, *e. g.*, C., the holder of a bill payable to bearer, assigns by deed certain property, including the bill, to D. C. no longer has any property in the bill, but he holds it, and if he transfer it by delivery to E., who takes it for value and without notice, E.'s title overrides D.'s.<sup>1</sup> A non-negotiable note is now generally assignable at law, as it has always been in equity.<sup>2</sup>

Bills to order  
transferred  
without in-  
dorsement.

Art. 104. If the holder of a bill payable to order transfers it for value without indorsing it the transaction operates as an equitable assignment of the bill.<sup>3</sup>

The transferee also acquires the right to compel indorsement.<sup>4</sup>

#### ILLUSTRATIONS.

1. C., the holder of a bill payable to order, transfers it to D. for value without indorsing it. D. cannot sue the acceptor in his own name, or negotiate the bill by indorsing it to E.<sup>5</sup>

2. A. draws a bill on B. payable to his own order. B. accepts. A. discounts the bill with C., but by mistake or fraud omits to indorse it. C. indorses the bill in blank in A.'s name, and sues B. C. cannot recover; he had no right to indorse the bill.<sup>6</sup>

3. C., the holder of a bill payable to order, transfers it to D. without indorsing it. If C. becomes bankrupt, the Court will compel his trustee in bankruptcy to indorse the bill.<sup>7</sup> If C. dies, the Court will compel his executor or administrator to indorse.<sup>8</sup>

<sup>1</sup> Cf. *Sheldon v. Parker* (1874), 3 Hun (N. Y.), 498; *Aulton v. Atkins* (1856), 18 C. B. 249.

<sup>2</sup> *Maxwell v. Goodrum* (1850), 10 B. Mon. (Ky.) 286; *Parkinson v. Finch* (1873), 45 Ind. 122; *Prescott v. Hull* (1820), 17 Johns. (N. Y.) 284.

<sup>3</sup> *Whistler v. Forster* (1863), 14 C. B. N. S. at 258; *Ex parte Pike* (1879), 40 L. T. N. S. 529; *Matteson v. Morris* (1879), 40 Mich. at 55; *Hadden v. Rodkey* (1877), 17 Kans. 429; *Freund v. Bank* (1879), 76 N. Y. 352 (check).

<sup>4</sup> *Harrop v. Fisher* (1861), 10 C. B. N. S. at 203, Byles, J.

<sup>5</sup> *Id.*; *Cunliffe v. Whitehead* (1837), 3 Bing. N. C. at 830; *Robinson v. Wilkins* (1873), 38 Mich. 299; Cf. *Hull v. Conover* (1871), 35 Ind. 372.

<sup>6</sup> *Id.*; *Hughes v. Nelson* (1878), 29 N. J. Eq. at 549.

<sup>7</sup> *Ex parte Mowbray* (1820), 1 Jac. & W. 428. Indorsement should negative personal liability: Cf. Art. 76. Indorsement by bankrupt is, it seems, equally good. *Ex parte Rhodes* (1837), 3 Mont. & Ayr. 217.

<sup>8</sup> Cf. *Watkins v. Maule* (1820), 2 Jac. & W. 237; *Hersey v. Elliot* (1878), 67 Me. 526.

4. C., the holder of a bill for \$1,000 payable to his order, deposits it with D. as security for a debt for \$300. C. becomes bankrupt. The Court will order C.'s trustee to indorse the bill to D. upon terms.<sup>1</sup>

Bills to order transferred without indorsement.

*Explanation.*—When indorsement is subsequently obtained, the transfer takes effect as a negotiation (Art. 106) from the time when the indorsement is given, unless it was omitted at the time of transfer, through fraud, accident or mistake. It then takes effect as a negotiation (probably) from the time of the transfer.<sup>2</sup>

#### ILLUSTRATIONS.

1. A. draws a bill on B. payable to C. or order. A. is induced to do so by C.'s fraud. C. transfers the bill to D. for value, but does not indorse it. D. subsequently receives notice of the fraud practiced on A. After this he obtains C.'s indorsement. D. cannot recover from A.—he has no better title than C. *Aliter* if he had obtained C.'s indorsement before he had notice of the fraud.<sup>3</sup>

2. B. makes a note payable to C. or order. C. transfers it to D. for value without indorsing it. After the note is overdue D. obtains C.'s indorsement. D. holds the note subject to all existing equities between B. and C.<sup>4</sup>

Art. 105. If the holder (Art. 3) of a bill make delivery of it by way of gift in contemplation of death and die, this is a valid *donatio mortis causa*.

Donatio mortis causa.

#### ILLUSTRATIONS.

1. C., the holder of a note payable to bearer, hands it to

<sup>1</sup> *Ex parte Price* (1844), 3 Mon. D. D. 586; but Cf. *Ex parte Brown* (1824), 1 Gl. & J. 407, where a different order was made.

<sup>2</sup> Cf. *Southard v. Porter* (1861), 43 N. H. at 380; *Hughes v. Nelson* (1878), 29 N. J. Eq., at 549; *Daniel*, § 745.

<sup>3</sup> *Whitler v. Forster* (1863), 14 C. B. N. S. 248; *Lancaster Bank v. Taylor* (1869), 100 Mass. 18.

<sup>4</sup> *Clark v. Whitaker* (1871), 50 N. H. 474. Not subject to equities arising since the transfer, *Beard v. Dedolph* (1871), 29 Wis. 137; *Whitaker v. Kuhn* (1879), 52 Ia. 315.



*Donatio mortis causa.*

D. in contemplation of death. C. dies. The property in the note passes to D.<sup>1</sup>

2. C., the holder of a bill payable to his order, gives it to D. in contemplation of death and dies. The title to the note passes to D.<sup>2</sup>

3. B. makes a note payable to C., and hands it to him as a gift in contemplation of death. B. dies. C. is not entitled to receive the amount out of B.'s estate.<sup>3</sup>

NOTE.—It is clear that the gift of a bill or note does not create a debt as against the donor, cf. Art. 91; but is this the principle of a *donatio mortis causa*? The law as to the gift of bills and notes made by the donor requires re-consideration.<sup>4</sup> The recent cases have arisen on checks where the peculiar relations of banker and customer complicate the matter; see Art. 262.

### *Transfer by Negotiation.*

Negotiation defined.

Art. 106. "Negotiation" means the transfer of a bill in the form and manner prescribed by the law merchant with the incidents and privileges annexed thereby, *i. e.*—

(1.) The transferee can sue all parties to the instrument in his own name.

(2.) The consideration for the transfer is *prima facie* presumed.

(3.) The transferor can under certain conditions give a good title, although he has none himself.

(4.) The transferee can further negotiate the bill with the like privileges and incidents.

<sup>1</sup> *Miller v. Miller* (1735), 3 P. Wms. 356.

<sup>2</sup> *Veal v. Veal* (1859), 27 Beav. 303; *Grover v. Grover* (1837), 24 Pick. (Mass.) 261; *Bates v. Kempton* (1856), 7 Gray (Mass.), 382.

<sup>3</sup> *Tate v. Hilbert* (1793), 4 Bro. C. C. 286; *Holliday v. Atkinson* (1826), 5 B. & C. at 503; *Parish v. Stone* (1833), 14 Pick. (Mass.) 198; Cf. *Weston v. Hight* (1840), 17 Me. 287 (estate not liable on donor's indorsement); *Smith v. Smith* (1879), 30 N. J. Eq. 564.

<sup>4</sup> Cf. *Williams on Executors*, 7 ed. pp. 778-780.

NOTE.—See rights of the holder, Arts. 136 to 144. Cf. Indian Code, Art. 14: A bill is negotiated when the holder transfers it to another person “so as to constitute that person the holder thereof.” See the negotiation of bills and notes distinguished from the sale of goods by Holroyd, J.,<sup>1</sup> the assignment of a chose in action by Willes, J.,<sup>2</sup> the transfer of shares in a company by Byles, J.,<sup>3</sup> and the transfer of an assignable Scotch bond by Blackburn, J.<sup>4</sup>

Art. 107. Subject to Art. 124 a bill is negotiable which in legal effect is payable either to order or to bearer.<sup>5</sup>

NOTE.—If a bill is expressed to be “negotiable and payable at the X. Bank,” its negotiability is not thereby limited; it may be negotiated anywhere.<sup>6</sup> By the law of Indiana, a note is not negotiable unless made payable at a bank in that State; and the name of the bank must be correctly stated. In an action in the courts of Missouri on a note executed in Indiana, but where it appears that there was no such bank as that named in the note as the place of payment, the assignor of the note is not liable as indorser.<sup>7</sup>

*Explanation 1.*—In order that a bill may be negotiable it must originally contain express words making it negotiable (Art. 8); but when a bill is in its origin negotiable, the absence in an indorsement of words implying power to transfer does not limit the negotiable effect of such indorsement.

#### ILLUSTRATIONS.

1. B. makes a note in the form “pay C,” omitting to add the words “or order.” If C. indorse it to D., his indorsement will not operate as a negotiation. The note is not negotiable.<sup>8</sup>

<sup>1</sup> *Wookey v. Pole* (1820), 4 B. & Ald. at 10 (comparing them to money).

<sup>2</sup> *Whistler v. Forster* (1863), 14 C. B. N. S. at 258.

<sup>3</sup> *Swan v. North British Co.* (1863), 2 H. & C. at 184. 185.

<sup>4</sup> *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 381.

<sup>5</sup> *Id.* at 382.

<sup>6</sup> *McArthur v. McLeod* (1859), 6 Jones L. (N. C.) 475. But Cf. *Parker v. Middleton* (1858), 29 Pa. St. 529.

<sup>7</sup> *Stix v. Matthews* (1881), 75 Mo. 96.

<sup>8</sup> *Plimley v. Westley* (1835), 2 Bing. N. C. 249; *Whyte v. Heylman* (1859), 34 Pa. St. 142. But Cf. Art. 248, Excep. 2. *Aliter*, as to an in-

What bills are negotiable.

2. A bill is drawn payable to C. or order. C. indorses it to D. thus, "Pay the contents to D," omitting to add the words "or order." The bill is negotiable, and D. can negotiate it by indorsing it to E.<sup>1</sup>

*Explanation 2.*—A bill is payable to bearer which is (a) expressed to be so payable, or (b) indorsed in blank.<sup>2</sup>

#### ILLUSTRATION.

C. is the holder of two bills, one drawn payable to C. or bearer, the other indorsed to him in blank. He transfers them to D. by merely handing them to him. This is a negotiation of the bills to D.

NOTE.—No particular form of words is necessary to render a bill negotiable, if such was the intention of the parties. Hence, though it is not made to "order" or "bearer" or "assigns," but merely contains the clause, "This bill is to be negotiable," it seems it would be within the rule.<sup>3</sup>

#### Modes of Negotiation.

Modes of negotiation.

Art. 108. There are two modes of negotiation: namely—(a) negotiation by delivery, and (b) negotiation by indorsement. The form of the instrument determines which mode is applicable.<sup>4</sup>

Negotiation of bill payable to bearer.

Art. 109. A bill, which in legal effect is payable to bearer, is negotiated by delivery alone.<sup>5</sup>

NOTE.—As to what constitutes a delivery, Cf. Arts. 53-55.

dorsement, *Edie v. East India Co.* (1761), 2 Burr. 1216; Cf. *Goodwin v. Roberts* (1875), L. R. 10 Ex. at 357, Ex. Ch. As to C.'s liability, Art. 217, n.

<sup>1</sup> *Edie v. East India Co.*, *supra*; *Leavitt v. Putnam* (1850), 3 N. Y. 494; Cf. *Goodwin v. Roberts*, *supra*.

<sup>2</sup> Cf. Arts. 8 and 116.

<sup>3</sup> *Parker v. Middleton* (1858), 29 Pa. St. at 530. But see *Carruth v. Walker* (1858), 8 Wis. 251; *Hosford v. Stone* (1877), 6 Neb. 378.

<sup>4</sup> Cf. *Gibson v. Minet* (1791), 1 H. Bl. at 606, H. L.; *Richards v. Daily* (1872), 34 Ia. at 429.

<sup>5</sup> *Id.*; Art. 107.

*Explanation.*—A bill made or become payable to bearer may be subsequently indorsed. Such indorsement merely adds the indorser's guarantee, and may at any time be struck out without affecting the negotiability of the instrument.<sup>1</sup>

Art. 110. A bill, which in legal effect is payable to order, is negotiated by indorsement.<sup>2</sup>

Art. 111. "Indorsement" means a writing on a bill signed by the holder, ordering the amount to be paid to a person therein designated, or to his order or to bearer.

*Explanation.*—An indorsement must be completed by delivery; and, unless the contrary be expressed, the term "indorsement" means an indorsement completed by delivery.<sup>3</sup>

The holder who indorses a bill is called an "Indorser." Any person who makes title to a bill through an indorsement is called an "Indorsee."<sup>4</sup>

NOTE.—This definition includes only indorsements proper, and not what may be called quasi-indorsements. If a person who is not the holder of a bill backs it with his signature, the liability incurred is not strictly that of an indorser, though such act is commonly termed an indorsement; but it in no way affects the transfer of the bill. His liability is considered, *post*, Art. 217, n. In France this quasi-indorsement is termed "Aval" as opposed to "Endossement," and indorsement proper.<sup>5</sup> The term "indorsement" used without qualification, includes indifferently an indorsement in blank and a special indorsement.<sup>6</sup>

Art. 112. Every indorsement consists *prima facie* of two distinct contracts—(a) the present transfer and

<sup>1</sup> *Fairclough v. Pavia* (1850), 9 Exch. 690, at 695; Cf. *Keene v. Beard* (1860), 8 C. B. N. S. at 382; *Brush v. Reeves* (1803), 3 Johns (N. Y.) 439.

<sup>2</sup> Cf. *Gibson v. Minet*, (1791), 1 H. Bl. 606, H. L.; *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 382, and Art. 107.

<sup>3</sup> *Lloyd v. Howard* (1850), 15 Q. B. 995; Cf. Arts. 53-55.

<sup>4</sup> *Barber v. Richards* (1851), 6 Exch. at 65.

<sup>5</sup> Cf. French Code, Arts. 141-142; *Nouquier*, §§ 821-836.

<sup>6</sup> *Harmer v. Steels* (1849), 4 Exch. at 15.

Indorsement  
both a transfer  
and an execu-  
tory contract.

negotiation of the bill; (b) the assumption of a future contingent liability on the part of the indorser.<sup>1</sup>

*Explanation.*—The liability of the indorser may be limited, negated, or enlarged without affecting the negotiation of the bill or note

#### ILLUSTRATION.

C. indorses a bill to D. by way of gift. The property in the bill passes to D., but C. is not liable as indorser. Art. 91.

*NOTE.*—For further illustrations see Arts. 64, 66, 68, 79, and Cf. Art. 61. See, also, Arts. 120, 121, 123. It is important to distinguish the two factors in an indorsement, i. e., the transfer and the indorser's contract, for they are often governed by different considerations. The first resembles a contract of sale, the second a contract of guarantee. The first is an executed, the second an executory contract. By the first a *jus in rem* is transferred, by the second a *jus in personam* is created.

Form of  
indorsement.

Art. 113. The mere signature (Art. 49) of the holder constitutes an indorsement, but any form of words may be added from which the intention to indorse can be gathered.<sup>2</sup>

#### ILLUSTRATIONS.

1. C., the holder of a bill, signs it, and writes thereon, "I hereby assign this draft and all benefit of the money secured thereby to D." This is an indorsement by C.<sup>3</sup>

2. C., the holder of a note, signs it and writes thereon, "I hereby assign all my right and title to the within note to D." This is an indorsement, and C. is liable as indorser.<sup>4</sup>

3. C., the holder of a note, signs it and writes thereon, "I bequeath—Pay the within to D., or his order, at my death,"

<sup>1</sup> Cf. *Denton v. Peters* (1870), 5 L. R. Q. B. 475; *Sigourney v. Clarke* (1846), 17 Conn. 519; *Castrique v. Buttigieg* (1855), 10 Moore, P. C. at 108; *Sinker v. Fletcher* (1878), 61 Ind. 276.

<sup>2</sup> *Pinkney v. Hall* (1690). 1 Ld. Raym. 175; *Partridge v. Davis* (1848), 20 Vt. 499; *Merchants' Bank v. Spicer* (1831), 6 Wend. (N. Y.) 443; *Cutting v. Conklin* (1862), 28 Ill. 506.

<sup>3</sup> *Richards v. Franklin* (1840), 9 C. & P. at 225; Cf. *Adams v. Blethen* (1877), 66 Me. 19.

<sup>4</sup> *Sears v. Lantz* (1878), 47 Ia. 658. But see *Aniba v. Yeomans* (1878), 89 Mich. 171, holding such indorsee subject to equities.

and gives it to D. This is not an indorsement, but an attempted <sup>Form of</sup> testamentary gift.<sup>1</sup> indorsement.

4. C., the holder of a note, signs it and writes thereon, "I hereby guarantee the payment of this note," and delivers it to D. This is not an indorsement, but a guaranty.<sup>2</sup>

NOTE.—French Code, Art. 137, requires an indorsement to be dated, to state the consideration, and the name of the indorsee, and to be to order. By Art. 138, if any of these requisites be wanting, it can only avail as a "procuracion."

Art. 114. The indorsement must be written on <sup>Must be on</sup> the bill itself.<sup>3</sup> the bill.

#### ILLUSTRATIONS.

1. An express promise in writing to indorse a bill is not an indorsement.<sup>4</sup>

2. The assignment of a note by a separate writing is not an indorsement.<sup>5</sup>

*Explanation 1.*—An indorsement on the face of a bill is valid.<sup>6</sup>

*Explanation 2.*—When there is no room on a bill for further indorsements, a slip of paper called an "Allonge" may be attached thereto. It becomes part of the bill, and indorsements may be written thereon.<sup>7</sup>

NOTE.—Some of the foreign codes contain minute provisions to prevent frauds, *e. g.*, that the first indorsement on the allonge

<sup>1</sup> *Mitchell v. Smith* (1864), 4 DeG. J. & S. 422.

<sup>2</sup> *Tuttle v. Bartholomew* (1847), 12 Met. (Mass.) 452; *Trust Co. v. Bank* (1879), 101 U. S. 68. *Contra*, *Partridge v. Davis*, (1848), 20 Vt. 499; *Childs v. Davidson* (1865), 38 Ill. 437; *Robinson v. Lair* (1870), 31 Ia. 9. Cf. *Kautzman v. Weirick* (1875), 26 O. St. 330 (in effect a Facultative Indorsement, Art. 121).

<sup>3</sup> Cf. *Gibson v. Minet* (1791), 1 H. Bl. at 606; *French v. Turner* (1860), 15 Ind. 59. But see *Bange v. Flint* (1870), 25 Wis. 544.

<sup>4</sup> Cf. *Harrop v. Fisher* (1861), 10 C. B. N. S. at 204; *Askeell v. Mitchell* (1866), 53 Me. 468. But Cf. *Pinney v. Ely* (1846), 4 McL. (C. Ct.) 173.

<sup>5</sup> *Re Barrington* (1804), 2 Scho. & Lef. 112; *Willis v. Cressey* (1840), 17 Me. 9; Cf. *Ex parte Harrison* (1789), 2 Brown C. C. 614. *Contra*, *Bange v. Flint* (1870), 25 Wis. 544.

<sup>6</sup> *Young v. Glover* (1857), 8 Jur. N. S. Q. B. 637; *Ex parte Yates* (1858), 2 DeG. & J. 191; *Herring v. Woodhull* (1862), 29 Ill. 92.

<sup>7</sup> Cf. *Monmohunee v. Secretary* (1874), 13 Bengal L. R. 359; *Folger v. Chase* (1836), 18 Pick. (Mass.), 63; German Exchange Law, Art. 11.

Must be on  
the bill.

must begin on the bill and end on the allonge; otherwise an allonge might be taken from one bill and stuck on to another; Cf. *Nouguier*, § 668.

*Exception.*—Indorsement on a “copy” in the case of a foreign Bill of Exchange.

NOTE.—As to “copies,” see *Nouguier*, §§ 208-211, and German Exchange Law, Arts. 70-72. A “copy” of a bill must be distinguished from the parts of a set; Cf. Art. 25, *ante*.

Partial in-  
dorsement.

Art. 115. A Partial indorsement, so as to split the right of action on a bill, is invalid as a negotiation.<sup>1</sup>

#### ILLUSTRATIONS.

1. C., the holder of a bill for \$100, indorses it, “Pay \$50 to D. or order, and \$50 to E. or order.” This is invalid. Neither D. nor E. can sue or further indorse.<sup>2</sup>

2. C., the holder of a bill for \$100, indorses it, “Pay D. or order \$30.” This is invalid, unless C. also acknowledge the receipt of \$70.<sup>3</sup>

Indorsement  
in blank.

Art. 116. An Indorsement in Blank or General indorsement consists merely of the signature of the indorser without the expression of any further intention.<sup>4</sup>

#### ILLUSTRATION.

Bill payable to the order of John Smith. He signs on the back “John Smith.” This act is interpreted by the law merchant as an indorsement in blank by John Smith, and operates as if he had written: 1. I hereby assign this bill to bearer. 2. I hereby undertake that if this bill be dishonored, I, on receiving due notice thereof, will indemnify the bearer.

<sup>1</sup>Cf. *Heilbut v. Nevill* (1869), 4 L. R. C. P. at 358; *Conover v. Earl* (1868), 26 Ia. 169; *Groves v. Ruby* (1865), 24 Ind. 418; see *Nouguier* § 665.

<sup>2</sup>Cf. *Heilbutt v. Nevill* (1869), 4 L. R. C. P. at 358. But Cf. *Flint v. Flint* (1863), 6 Allen (Mass.), 34.

<sup>3</sup>*Hawkins v. Cardy* (1699), 1 Ld. Raym. 360; *Frank v. Kaigler* (1871), 36 Tex. 305.

<sup>4</sup>Cf. German Exchange Law, Art. 12, and indorsement in blank distinguished from special indorsement; per Wilde, C. J., *Harmer v. Steele*

NOTE.—Under French Code, Arts. 137-138, an indorsement in blank merely operates as a “procuration,” and not as a negotiation of the bill.<sup>1</sup> The indorsee is considered as the agent or “mandataire” of the indorser, and their relations are regulated accordingly. If, however, the indorsee has given value, he may convert the blank into a special indorsement.—*Nouguier*, §§ 747-760.

*Explanation.*—A bill indorsed in blank is payable to bearer and may be negotiated by delivery alone.<sup>2</sup>

Art. 117. A Special or Full indorsement designates the person to whom or to whose order the bill is thereby made payable.

#### ILLUSTRATIONS.

1. “Pay D. or order.”
2. “Pay to D. & Co.,” which in legal effect is “pay D. & Co., or order.”<sup>3</sup>
3. “Pay to the order of the D. Company,” which in legal effect is “pay the D. company or order.”<sup>4</sup>

*Explanation.*—A bill specially indorsed is payable to the indorsee therein designated, and can only be negotiated by his indorsement.<sup>5</sup>

Art. 118. The holder of a bill indorsed in blank may convert such blank indorsement into a special indorsement by writing over the indorser’s signature a direction, ordering the amount of the bill to be paid to himself, or some other person.<sup>6</sup>

(1849), 4 Exch. at 15; per Parke, B., *Roberts v. Tucker* (1851), 16 Q. B. at 579; and per Erle, C. J., *Law v. Parnell* (1859), 7 C. B. N. S. at 285.

<sup>1</sup> Cf. *Bradlaugh v. De Rin* (1870), 5 L. R. C. P. 473, Ex. Ch.; *Nouguier*, § 766.

<sup>2</sup> *Peacock v. Rhodes* (1781), 2 Dougl. at 636, per Lord Mansfield; *Swan v. N. B. Australasian Co.* (1863), 2 H. & C. at 184; *Curtis v. Sprague* (1876), 51 Cal. 239; *Morris v. Preston* (1879), 98 Ill. 215.

<sup>3</sup> Art. 107.

<sup>4</sup> *Sonres v. Glyn* (1845), 8 Q. B. at 34, Ex. Ch.; Art. 8 Expl. 2.

<sup>5</sup> *Harrop v. Fisher* (1861), 30 L. L. C. P. 283; *Burnap v. Cook* (1863), 32 Ill. 168.

<sup>6</sup> *Clerk v. Pigot* (1699), 12 Mod. 193; *Cole v. Cushing* (1829), 8 Pick. (Mass.), 48; *Hance v. Miller* (1859), 21 Ill. 636; *Erwin v. Lynn* (1866), 16 O. St. at 545; German Exchange Law, Art. 13; *Nouguier*, §§ 747-748.



Conversion of  
blank into  
special in-  
dorsement

*Explanation.*—The holder who converts a blank into a special indorsement does not thereby incur the liabilities of an indorser.<sup>1</sup>

#### ILLUSTRATION.

D. is the holder of a bill indorsed in blank by C. D. writes over C.'s signature "Pay to E. or order," and hands the bill to E. This operates as a special indorsement from C. to E.

Blank indorse-  
ment followed  
by special

Art. 119. The negotiability of a bill which is originally payable to bearer, or which has been indorsed in blank, is not restrained by a subsequent special indorsement. It is still payable to bearer.<sup>2</sup>

*Explanation.*—The special indorser is only liable on his indorsement to such parties as make title through it.

#### ILLUSTRATION.

C., the payee of a bill, indorses it in blank and transfers it to D. D. specially indorses it to E., or order. E., without indorsing it, transfers it to F. Then F. is entitled, as bearer, to receive payment and to sue the drawer, acceptor, and C., but he cannot sue D. or E.<sup>3</sup>

*NOTE.—Striking out Indorsements.* The holder may at any time (*e. g.*, at the trial after the plaintiff has finished his case)<sup>4</sup> strike out any indorsement which is not necessary to his title. The indorser whose indorsement is intentionally struck out, and all indorsers subsequent to him, are discharged from their liabilities; *aliter* if the indorsement be struck out by mistake.<sup>5</sup>

But holder is not *obliged* to fill the blank before recovery, *Poorman v. Mills* (1868), 35 Cal. 118; *Cf. Palmer v. Bank* (1875), 78 Ill. at 381; *Greenough v. Smead* (1854), 3 O. St. 415.

<sup>1</sup> *Vincent v. Horlock* (1808), 1 Camp. 441, and Art. 72.

<sup>2</sup> *Walker v. Macdonald* (1848), 2 Exch. 527; *Rider v. Taintor* (1862), 4 Allen (Mass.), 356; *Johnson v. Mitchell* (1878), 50 Tex. 212. But see *Dudman v. Earl* (1878), 49 Ia. 37, where point seems to have been overlooked. Otherwise now in England, British Code, § 8 (3).

<sup>3</sup> *Id.* and *Story*, § 207.

<sup>4</sup> *Smith v. Clarke* (1794), Peake. 225.

<sup>5</sup> *Mayer v. Jadis* (1833), 1 M. & Rob. 247; *Cf. Porter v. Cushman* (1858), 19 Ill. at 574; *Bank v. Senior* (1876), 11 R. I. 376.

<sup>6</sup> *Wilkinson v. Johnson* (1824), 3 B. & C. 428; *Brett v. Marston* (1858), 45 Me. 401; Art. 240. Or if not struck out at all, though prior blank indorsement filled up and action brought thereon, *Cole v. Cushing* (1829), 8 Pick. (Mass.) 48.

The holder may, in some cases, make title through a person whose indorsement is struck out.<sup>1</sup> Indorsements for collection may be struck out by the owner of the bill,<sup>2</sup> and if the indorser of a bill takes it up or pays it when dishonored, he may strike out his own and all subsequent indorsements, whether blank or special.<sup>3</sup> Cf. Art. 239.

Blank indorsement followed by special.

Art. 120. A Qualified indorsement in express terms limits or negatives the ordinary liability of the indorser. It relates only to the indorser's liability, and does not otherwise affect the negotiation of a bill so indorsed.<sup>4</sup>

Qualified indorsement.

#### ILLUSTRATIONS.

1. C., the holder of a bill, indorses it to D. thus: "Pay D. or order without recourse to me," or "Pay D. or order sans recours,"<sup>5</sup> or "Pay D. or order at his own risk."<sup>6</sup> C. thereby passes his interest to D., but incurs no liability as an indorser.

2. E., the holder of a bill indorses on the back in three successive lines, as follows: "Green & Nichols, . . . without recourse . . . Asa Perley," sues G. & N. as indorsers. If defendants show that "without recourse" was written by them at the time of transfer, E. cannot recover, though ignorant of the fact when he took the bill.<sup>7</sup>

NOTE.—It is held in America that an indorser "without recourse" is responsible to the same extent that a transferor by delivery is responsible, *e. g.*, where the bill is a forgery.<sup>8</sup> See Art. 226.

<sup>1</sup> *Fairelough v. Paria* (1854), 9 Exch. at 695; but Cf. *Bartlett v. Benson* (1845), 14 M. & W. 733.

<sup>2</sup> *Dugan v. U. S.* (1818), 3 Wheat. (U. S.) 173; *Bank of Utica v. Smith* (1820), 18 Johns. (N. Y.) 229; *Reading v. Beardsley* (1879), 41 Mich. 123.

<sup>3</sup> *Callow v. Lawrence* (1814), 3 M. & S. 95; *Dolfus v. Frosch* (1845), 1 Den. (N. Y.) 367; *Bond v. Storrs* (1840), 13 Conn. 412.

<sup>4</sup> Cf. *Castrique v. Buttigieg* (1855), 10 Moore P. C. 110-112, and 117; *Stevenson v. O'Neal* (1874), 71 Ill. 314; German Exchange Law, Art. 14; *Nougner*, §§ 268-270. Qualification must be clear, *Fassin v. Hubbard* (1874), 55 N. Y. 465.

<sup>5</sup> *Goupy v. Harden* (1816), 7 Taunt. 163.

<sup>6</sup> *Rice v. Stearns* (1807), 3 Mass. 224.

<sup>7</sup> *Fitchburg Bank v. Greenwood* (1861), 2 Allen (Mass.), 434. But Cf. *Lawrence v. Dobyns* (1860), 30 Mo. 196.

<sup>8</sup> *Dumont v. Williamson* (1867), 18 O. St. 515; *Hannum v. Richardson* (1875), 48 Vt. 508; *Watson v. Chesire* (1865), 18 Ia. 202.

Facultative  
indorsement

Art. 121. A Facultative indorsement in express terms waives the duties or enlarges the rights of the holder. It relates only to the indorser's liability, and does not otherwise affect the negotiation of a bill so indorsed.

#### ILLUSTRATION.

C., the holder of a bill, indorses it to D., adding the words "Notice of dishonor waived." No subsequent party is obliged to give notice of dishonor to C.<sup>1</sup>

NOTE.—Notice of dishonor may be waived verbally; *a fortiori*, then it may be waived in express terms. If notice of dishonor or other duty of the holder is expressly waived in the *body* of the bill, it then forms a part of the contract, and is binding on every indorser as well as the drawer;<sup>2</sup> and in France a similar construction has been put on the phrase "Retour sans frais" or "Retour sans protêt."<sup>3</sup>

Indorsement  
in need.

Art. 122. The indorser of a bill of exchange may insert in his indorsement a reference in case of need. (Cf. Art. 7).<sup>4</sup>

Conditional  
indorsement.

Art. 123. A Conditional indorsement transfers the bill to the indorsee, subject to the fulfilment of a condition therein specified. On the failure of the condition the title to the bill reverts to the indorser.<sup>5</sup>

#### ILLUSTRATIONS.

C., the holder of a bill, indorses it, "Pay D. or order upon my name appearing in the *Gazette*, as ensign in any regiment, between the 1st and 64th, if within two months from this date." The bill is subsequently accepted. D. indorses it to E., who

<sup>1</sup>Cf. *Phipson v. Kelner* (1818), 4 Camp. 285; *Emery v. Hobson* (1873), 62 Me. 578; Arts. 168, cl. 4, 200, cl. 7.

<sup>2</sup>*Lovry v. Steele* (1866), 27 Ind. 163; *Rooker v. Moores* (1878), 61 Ind. 286; *Bryant v. Lord* (1872), 19 Minn. 396; *Farmers' Bank of Ky. v. Ewing* (1880), 78 Ky. 264; *Aliter*, if waived only in the indorsement, *Central Bank v. Davis* (1837), 19 Pick. (Mass.) 373. *Contra*, *Parshlew v. Heath* (1879), 69 Me. 90; S. C., 31 Am. R. 246.

<sup>3</sup>*Nouguier*, § 259. German Exchange Law, Art. 42, is ambiguous.

<sup>4</sup>Cf. *Leonard v. Wilson* (1834), 2 Cr. & M. 589; and Art. 184.

<sup>5</sup>*Story*, § 217; *Thomson*, p. 185.

indorses it to F. At maturity F. presents the bill to the acceptor who pays it, although the condition has not been fulfilled. The payment is invalid, and C. can sue the acceptor on the bill and recover.<sup>1</sup>

NOTE.—The validity of a conditional indorsement is perhaps doubtful. *Robertson v. Kensington* (1811),<sup>1</sup> seems to be the only decision on the point either in England or America. The judgment is not given in the report, so the *ratio decidendi* is not clear. Byles, Chitty, and Story merely say that a conditional indorsement is effectual, if the bill be subsequently accepted. In *Soares v. Glyn* (1845),<sup>2</sup> the Exchequer Chamber seem to doubt whether a conditional indorsement could be allowed by the law merchant. No foreign code recognizes a conditional indorsement. *Pothier* (No. 38) says that the indorser in his indorsement must conform to the same conditions as the drawer in his draft. It is continually laid down in the cases that the indorser is a new drawer, though not the drawer of a new bill. Apply this as a test. The drawer, who is in direct relation with the drawee, may not draw a bill conditionally (Art. 10). Why should the indorser, who is a stranger to the drawee, be allowed to impose a condition which the drawer may not? Again, the payee of a bill must be certain (Art. 9); does not this apply to the indorsee? But under a conditional indorsement the title of the indorsee is defeasible. It is uncertain whether the indorser or the indorsee is the person entitled to receive payment. It would be convenient to give effect to a conditional indorsement, as if it were merely restrictive. In that case the indorsee would be entitled to collect the bill irrespective of the fulfilment of the condition. If the condition were fulfilled he would hold the proceeds on his own account; if it were not he would hold them in trust for the indorser. Though the conditional transfer of a bill gives rise to difficulty, there seems to be no reason why the indorser's liability should not be conditional (Cf. Art. 112). Cf. Indian Code, Art. 52, which provides that "the indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon, depend upon the happening of a specified event, although such event may never happen." As to the conditional delivery of a bill absolute in form, see *ante*, Art. 55.

<sup>1</sup> *Robertson v. Kensington* (1811). 4 Taunt. 30.

<sup>2</sup> 8 Q. B. at 30; Cf. too, *Mitchell v. Smith* (1864). 4 DeG., J. & S. 422. But see *Tappan v. Ely* (1836), 15 Wend. (N. Y.) 362.

Restrictive indorsement.

Art. 124. A Restrictive indorsement constitutes the indorsee the holder of the bill, but expresses that he is not the beneficial owner of it.

## ILLUSTRATIONS.

1. "Pay D. or order for the use of X."<sup>1</sup>
2. "Pray pay the money to my use."<sup>2</sup>
3. "Pay the contents to my servant for my use."<sup>3</sup>
4. "The within must be credited to D., value in account."<sup>4</sup>
5. "Pay the contents to my use," or "Pay the contents to the use of X," or "Carry this bill to the credit of X."<sup>5</sup>
6. "Pay D. or order for our use, value received in account."<sup>6</sup>
7. "Pay D. or order for the account of X."<sup>7</sup>
8. "Pay D. or order for my use."<sup>8</sup>
9. "Pay to the order of D. & Co., under provision for my note in favor of X."<sup>9</sup>
10. "Pay D. & Co. or order for collection."<sup>10</sup>

NOTE.—A "restrictive indorsement" may perhaps be defined as "an indorsement which expresses that it is a mere authority to deal with the bill as directed, and not a transfer of the ownership thereof." Cf. *British Code*, § 35.

*Explanation 1.*—A statement in an indorsement that the value for it has been furnished by some person other than the indorsee does not make it restrictive."

<sup>1</sup> *Erans v. Cramlington* (1687), 1 Show. 4; 2 Show. 509 Ex. Ch.; *Hook v. Pratt* (1879), 78 N. Y. 371.

<sup>2</sup> Cf. *Snee v. Prescott* (1743), 1 Atk. at 249.

<sup>3</sup> *Edie v. East India Co.* (1761), 2 Burr. at 1227, Wilmot, J.

<sup>4</sup> *Anchor v. Bank* (1781), 2 Dougl. 637.

<sup>5</sup> Cf. *Rice v. Stearns* (1807), 3 Mass. at 226; *Lee v. Bank* (1860), 1 Bond (C. Ct.), 387 at 390.

<sup>6</sup> *Wilson v. Holmes* (1809), 5 Mass. 543.

<sup>7</sup> *Treuttel v. Barandon* (1817), 5 Taunt. 100; *Blaine v. Bourne* (1875), 11 R. I. 119.

<sup>8</sup> *Sigourney v. Lloyd* (1828), 8 B. & C. 622; affirmed, 5 Bing. 525 Ex. Ch.

<sup>9</sup> *Wedlake v. Burley* (1830), Lloyd & Welsby, 330.

<sup>10</sup> *Sweeney v. Easter* (1863), 1 Wall. (U. S.) 166; *Merchants' Nat. Bank v. Hanson* (1884), 33 Min. 40; S. C., 53 Am. R. 5; *Mechanics' Bank v. Valley P. Co.* (1877), 4 Mo. Ap. 200; *Claflin v. Wilson* (1879), 51 Ia. 15; German Exchange Law, Art. 17.

<sup>11</sup> *Potts v. Reed* (1806), 6 Esp. 57; *Murrow v. Stuart* (1853), 8 Moore P. C. 267; Cf. Art. 10, Expl. 2.

## ILLUSTRATION.

Restrictive indorsement.

Bill is indorsed "Pay D., or order, value in account with X."  
This is not restrictive. It is in effect a simple indorsement to D. or order.<sup>1</sup>

*Explanation 2.*—The mere omission to add words of negotiability to a special indorsement does not make it restrictive. Art. 107.

NOTE.—An indorsement in the form "Pay D. only" is probably restrictive, as being in terms a mere authority to D. to collect. If it appeared that D. was a holder for value, it is doubtful how far the restriction would be operative.<sup>2</sup> Under German Exchange Law, Art. 15, if C. indorse a bill "pay D. only," the result is this: D. can still indorse the bill away, but C. is not liable on his indorsement. It is in effect an indorsement "without recourse," and not a restrictive indorsement.

*Explanation 3.*—A restrictive indorsement gives the indorsee no power to transfer his rights as indorsee unless it expressly authorize him so to do.<sup>3</sup>

## ILLUSTRATION.

Bill indorsed, "Pay to D. for my account." D. cannot, by indorsing it to E., authorize E. to collect it. *Aliter* if the indorsement ran, "pay D. or order for my account."

*Explanation 4.*—A restrictive indorsement gives the indorsee the right to collect the bill and to sue any party thereto that his indorser could have sued.<sup>4</sup>

NOTE.—It has never been attempted to make the payor responsible for the due application of the proceeds by the in-

<sup>1</sup> *Buckley v. Jackson* (1868), 3 L. R. Ex. 135.

<sup>2</sup> Cf. *Edie v. East India Co.* (1761), 2 Burr. 1225-1227, per Dennison, J., and Wilmot, J.; *Rice v. Stearns* (1807), 3 Mass. at 225, *Power v. Finnie* (1797), 4 Call (Va.), 411.

<sup>3</sup> *Lloyd v. Sigourney* (1829), 5 Bing. at 532, Ex. Ch.; *Lee v. Bank* (1860), 1 Biss. (C. Ct.) 325; *Lawrence v. Fussell* (1875), 77 Pa. St. 460; Cf. *Pothier*, No. 89; German Exchange Law, Art. 17.

<sup>4</sup> *Evans v. Cramlington* (1687), 2 Show. 509, Ex. Ch.; *Wilson v. Holmes* (1809), 5 Mass. 543; *McWilliams v. Bridges* (1878), 7 Neb. 419; Cf. German Exchange Law, Art. 17. *Contra*, under statutes requiring actions to be prosecuted in name of real party in interest, *Rock Co. Bank v. Hollister* (1875), 21 Minn. 385.

Restrictive indorsement. indorsee, and it is clear that he is not responsible. In the cases where the restricted indorsee has sued, the bill has been payable to him "or order." Can the omission of these words make any difference?<sup>1</sup>

*Explanation 5.*—The indorsee, under a restrictive indorsement, may transfer his rights as indorsee if he be authorized by the terms of the indorsement so to do. In such case, the second and every subsequent indorsee takes the bill with the same rights and subject to the same liabilities as the original restricted indorsee.<sup>2</sup>

*Explanation 6.*—When a bill is indorsed restrictively, the relation between the indorser and the indorsee is that of principal and agent.<sup>3</sup>

#### ILLUSTRATIONS.

1. C. indorses a bill "Pay D. or order for my use." D. indorses it to, and discounts it with, E. on his own account. E. collects it at maturity. C. can recover the amount of the bill from E.<sup>4</sup>

2. C. indorses a bill "Pay D. or order for the use of X." D. collects the bill at maturity. If he misappropriate the money, X. cannot sue him.<sup>5</sup> The action must be brought by C.<sup>6</sup>

3. C. indorses a bill "Pay D. or order for account of X." D. is X.'s agent. D. indorses the bill to E., who collects it. X. can sue E. for the amount so received.<sup>7</sup>

4. A. draws a bill on B., and indorses it to C. C. indorses it, "Pay D. or order for my use." The bill is dishonored, and

<sup>1</sup> Cf. *Dehors v. Harriott* (1691), 1 Show. 163, when the indorser sued.

<sup>2</sup> *Treuttel v. Barandon* (1817), 8 Taunt. 10; *Lloyd v. Sigourney* (1829), 5 Bing. at 531; *Sweeney v. Easter* (1833), 1 Wall. (U. S.), 166; *Hook v. Pratt* (1879), 78 N. Y. at 375; German Exchange Law, Art. 17.

<sup>3</sup> Cf. *Dehors v. Harriott*, *supra*; *Potts v. Reed* (1806), 6 Esp. at 59; *Williams v. Shadbolt* (1835), 1 C. & E. 529; *Rice v. Stearns* (1807), 3 Mass. at 225; *Blaine v. Bourne* (1875), 11 K. L. 119; by analogy, *Maguire v. Dodd*, (1859), 9 Ir. Ch. 452; *Pothier*, Nos. 23, 89-90.

<sup>4</sup> *Lloyd v. Sigourney* (1829), 5 Bing. 525.

<sup>5</sup> *Wedlake v. Hurley* (1830), Lloyd & Welsby, 330.

<sup>6</sup> *Id.* at 332, per Vaughan, B.

<sup>7</sup> *Treuttel v. Barandon* (1817), 8 Taunt. 100. If D. had not been X., agent, C. must have brought the action.

D. sues A., the drawer. If A. have any defense against C.,<sup>Restrictive indorsement.</sup> he may set it up against D.<sup>1</sup>

NOTE.—The restricted indorsee is frequently termed a trustee, but he is only a trustee in the sense that an agent is a trustee.<sup>2</sup> German Exchange Law, Art. 17, deals with restrictive indorsements, and accords with our law, as stated above. In France the mere omission of the statement of the value received makes an indorsement restrictive.<sup>3</sup> The indorsee is then deemed to be the agent or “mandataire” of the indorser. *Pothier*, Nos. 23 and 80–90, has worked out the results with great clearness.

### *Who May Negotiate a Bill.*

Art. 125. A bill must be negotiated by the *de facto* holder. The transfer of a bill by any other person<sup>De facto holder must negotiate.</sup> does not operate as a negotiation of the instrument.<sup>4</sup>

*Explanation.*—“*De facto* holder” means the person in possession of a genuine bill, to whom it is in terms payable, whether he be lawfully in possession thereof or not.

NOTE.—The term “holder” is used in the cases in different senses. It is generally used to denote the “lawful holder,” and as such it is defined in Art. 3. It then includes—(1) the person to whom a bill is in terms payable, and whose title is good against all the world; (2) the person to whom a bill is in terms payable, and who, as against third parties, is entitled to enforce payment—though as between himself and his transferor, he is a mere agent or bailee with a defeasible title (*e. g.*, an indorsee for collection). But “holder” is also used to denote an unlawful holder—that is, the person to whom a bill is in terms payable, whose possession is unlawful, but who nevertheless can give—(a) a valid discharge to a person who pays it in good faith (see Art. 236), and (b) a good title to a person who takes it before maturity in good faith and for value (see Art. 137). An unlawful holder must be distinguished from the mere wrongful possessor: *e. g.*, a person holding under a forged indorsement, or a person who has stolen a bill payable to order,

<sup>1</sup> *Wilson v. Holmes* (1809), 5 Mass. 543.

<sup>2</sup> *Cf. Cook v. Lister* (1863), 13 C. B. N. S. at 597, Willes, J.

<sup>3</sup> *Cf. French Code*, Art. 138; *Nouguier*, § 744.

<sup>4</sup> *Bolles v. Stearns* (1853), 11 Cush. (Mass.), 320.



*De facto*  
holder must  
negotiate.

who has no rights and can give none. When, then, a proposition is laid down which applies equally to lawful and unlawful holders, the term *de facto* holder is used to include both.

Bill to bearer.

Art. 126. The *de facto* holder of a bill payable to bearer (Art. 107) is the person in possession of it.

#### ILLUSTRATIONS.

1. C., the payee of a bill, indorses it in blank and transmits it to D. for some special purpose (*e. g.*, discount or collection). As long as D. retains possession D., and not C., is the *de facto* holder, and he alone can negotiate it.<sup>1</sup>

2. C. is the holder of a note payable to bearer. C. loses it and D. finds it. D., and not C., is the *de facto* holder, and he alone can negotiate it.

Who may ne-  
gotiate bill to  
order.

Art. 127. The *de facto* holder of a bill payable to order is the person in possession of it, and to whose order it is payable.

NOTE.—See, in illustration, Arts. 103, 104.

*Explanation.*—If the person to whose order a bill is meant to be payable is wrongly designated, or if his name is misspelled, he may negotiate the bill by indorsing it as described.<sup>2</sup>

#### ILLUSTRATIONS.

1. A bill is indorsed to J. Smythe. The man's real name is T. Smith. He can validly negotiate the bill by indorsing it as J. Smythe.<sup>3</sup>

2. John Smith trades as "Brown & Co." A bill is drawn payable to the order of "Brown & Co." He may transfer it by an indorsement "John Smith," or "Brown & Co."<sup>4</sup>

<sup>1</sup> *Marston v. Allen* (1841), 8 M. & W. at 504.

<sup>2</sup> *Williamson v. Johnson* (1823), 1 B. & C. at 149, Holroyd, J.; *Schultz v. Astley* (1836), 2 Bing. N. C. at 553, Tindal, C. J.; Cf. *Chenot v. Lefevre* (1846), 3 Gilm. (Ill.) 6:7.

<sup>3</sup> *Id.*; Cf. *Willis v. Barrett* (1816), 2 Stark. 29.

<sup>4</sup> *Bryant v. Eastman* (1851), 7 Cush. (Mass.) 111; *Blodgett v. Jackson* (1859), 40 N. H. 21; Cf. *Walker v. Macdonald* (1848), 2 Exch. 527. But production of bill to the order of "John Smith" indorsed "Brown

NOTE.—The usual and proper course is for the holder to sign first the name as described or spelled in the bill, and then to put underneath his proper signature—*e. g.*, in the case given the indorsement would be signed,

J. Smythe,  
T. Smith.

*Exception.*—When the title to a bill payable to order is transmitted by act of law, and the person to whom the title is transmitted obtains possession of the bill, he becomes the *de facto* holder.

NOTE.—See transmission by marriage (Art. 98), death (Arts. 99–100). See, also, dissolution of partnership (Art. 80). For another exception of doubtful expediency in the case of banking, and perhaps other corporations, see *ante*, Art. 71, Expl. 1, n.<sup>1</sup>

Art. 128. Where a bill is payable to the order of two or more persons who are not partners, all must indorse.<sup>2</sup>

*Explanation.*—One may indorse on behalf of the rest if he have authority so to do.<sup>3</sup>

#### ILLUSTRATIONS.

1. B. accepts a bill payable to the “order of C. and D.” D. alone indorses it to E. This is insufficient. E. cannot sue B.<sup>4</sup>

2. Bill payable to “the order of C. and D.” C. by D.’s authority, indorses it to E. “for self and D.” This is sufficient.

3. Bill payable to “C. and D. or the order of either.” C. alone indorses it to E. This is sufficient.<sup>5</sup>

& Co.” would not be sufficient evidence of title in the holder: Cf. *Redmond v. Stansbury* (1872), 24 Mich. 445.

<sup>1</sup>See, also, *Waterliet Bank v. White* 1845), 1 Den. (N. Y.) 608; *First Nat. Bank v. Hall* (1871), 44 N. Y. 395.

<sup>2</sup>*Ryhiner v. Feickert* (1879), 92 Ill. 305; *Lane v. Stacy* (1864), 8 Allen (Mass.), at 42; Arts. 77 *et seq.*

<sup>3</sup>*Carvick v. Vickery* (1781), 2 Dougl. 652; and Cf. *Heilbut v. Nevill* (1869), 4 L. R. C. P. at 355, 358, per Willes, J.

<sup>4</sup>*Id.*; *Smith v. Whiting* (1812), 9 Mass. 334.

<sup>5</sup>Cf. *Watson v. Evans* (1863), 32 L. J. Ex. 137.

*To Whom a Bill may be Negotiated.*

Certainty as  
to indorsee.

Art. 129. When a bill is specially indorsed, the indorsee must (probably) be designated with the same certainty that is requisite in the case of an original payee.<sup>1</sup>

NOTE.—Art. 123 creates the doubt. See the question there discussed. As to payee, see Art. 9.

Re-transfer and  
re-issue.

Art. 130. A bill may be negotiated to any party thereto—*i. e.*, drawer, drawee, acceptor or prior indorser, and such party, subject to Art. 238, may re-issue and further negotiate it.<sup>2</sup>

## ILLUSTRATIONS.

1. C. is the holder of a bill accepted by B., payable three months after date. C. can indorse the bill to B., the acceptor, and B., at any time *before maturity*, may re-issue, and indorse it to D.<sup>3</sup>

2. A., the drawer of a bill payable to his own order, indorses it to C. C. indorses it to D. who indorses it back to A. A. can re-issue the bill and indorse it to E.<sup>4</sup>

*Explanation.*—When a bill is negotiated back to a party already liable thereon, he cannot sue the intermediate parties.<sup>5</sup>

## ILLUSTRATIONS.

1. C., the holder of a bill, indorses it to D. D. indorses it to E., who indorses it back to C. C. cannot sue D. or E., for they in turn could sue him as a prior indorser.<sup>6</sup> But D. and E.

<sup>1</sup> Cf. *Pothier*, No. 38; *Soares v. Glyn* (1845), 8 Q. B. at 30, Ex. Ch.; *Murray v. East India Co.* (1821), 5 B. & Ad. 204.

<sup>2</sup> Cf. *Pinney v. McGregor* (1869), 102 Mass. 186; *Palmer v. Gardiner* (1875), 77 Ill. 143; German Exchange Law, Art. 10.

<sup>3</sup> *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244; *Witte v. Williams* (1876), 8 S. C. 290.

<sup>4</sup> Cf. *Hubbard v. Jackson* (1827), 4 Bing. 390; *Jones v. Broadhurst* (1850), 9 C. B. 173.

<sup>5</sup> Cf. *Wilders v. Stevens* (1846), 15 M. & W. 208, at 212, per Alderson, B.

<sup>6</sup> *Bishop v. Hayward* (1791), 4 T. R. 470; *Moore v. Cross* (1859), 91 N. Y. at 228; *Palmer v. Whitney* (1863), 21 Ind. 58.

have not been *discharged*, for if C. re-indorse to F., they are liable to him as indorsers.<sup>1</sup> Re-transfer and re-issue.

2. C. the holder of a bill, indorses it "without recourse" to D., who indorses it to E. E. indorses it back to C. C. can sue D. and E., for they have no claim against him as a prior indorser.<sup>2</sup>

3. B., for the accommodation of C., makes a note in his favor. C. indorses it to D., who discounts it with B., the maker. B. can sue C.<sup>3</sup>

4. The drawer of a bill indorses it to C., who has previously undertaken to be responsible for the price of goods supplied to the acceptor. C. indorses the bill back to the drawer. The drawer, in his character of indorsee, can sue C., for C. has no remedy over against him.<sup>4</sup>

NOTE.—The Explanation given above is necessary in order to avoid circuity of action. See further Art. 234, Expl. 2.

### *Time of Negotiation.*

Art. 131. A bill which is in form complete and negotiable (Art. 107), may be negotiated at any time until it is discharged.<sup>5</sup> Negotiable till discharged.

*Explanation.*—The character and incidents of the negotiability of a bill depend on the time at which it is negotiated.

NOTE.—As to the transfer of a bill incomplete in point of form, see Art. 23; as to the issue of a bill by a person other than the maker, Art. 54.

Art. 132. Unless the contrary appear on the instrument itself, a bill is *prima facie* presumed to have Presumption as to time.

<sup>1</sup> *West Boston Bank v. Thompson* (1878), 124 Mass. at 515.

<sup>2</sup> Cf. *Morris v. Walker* (1850), 15 Q. B. at 594; *Calhoun v. Albin* (1871), 48 Mo. at 306.

<sup>3</sup> *Id.*

<sup>4</sup> *Wilkinson v. Unwin* (1881), 7 Q. B. D. 636, C. A.

<sup>5</sup> *Callow v. Lawrence* (1814), 3 M. & S. at 97; *French v. Jarvis* (1860), 29 Conn. 348; Chapter vii, *post*.

Presumption as to time. been negotiated at its inception,<sup>1</sup> or at least before maturity,<sup>2</sup> but apart from this general rule, there is no presumption as to the exact time of negotiation.<sup>3</sup>

NOTE.—Circumstances of strong suspicion short of direct evidence may rebut the *prima facie* presumption and make it a question for the jury whether a bill was negotiated before or after maturity.<sup>4</sup>

When bill deemed overdue.

Art. 133. All bills not payable on demand are deemed overdue after the expiration of the last day of grace;<sup>5</sup> Cf. Art. 20.

It is uncertain when a bill of exchange payable on demand and not known to have been dishonored is to be deemed overdue.<sup>6</sup>

*Explanation.*—A bill payable in instalments is deemed overdue *in toto*, when any instalment is overdue;<sup>7</sup> but a bill is not deemed overdue from the mere fact that interest is overdue.<sup>8</sup>

NOTE.—A bill of exchange payable on demand is, like a check, ordinarily intended for immediate presentation, and is probably governed by the same rule as to when it is to be deemed overdue.<sup>9</sup> By the British Code, § 36 (3) it is to be deemed overdue when it appears on the face of it to have been in circulation for an unreasonable length of time—a question of fact. This enactment is probably declaratory merely. As to a note payable on demand, which is a continuing security, see Art. 282. As to a check, Art. 259. Is a transfer on the

<sup>1</sup> *Good v. Martin* (1877), 95 U. S. at 94; *Noxon v. DeWolf* (1853), 10 Gray (Mass.), 343; *Clarke v. Johnson* (1870), 54 Ill. 296; *Hayward v. Munger* (1863), 14 Ia. 516.

<sup>2</sup> *Lewis v. Parker* (1836), 4 A. & E. 838; *Rangerv. Cary* (1840), 1 Met. (Mass.), at 363; *McDowell v. Goldsmith* (1854), 6 Md. 320.

<sup>3</sup> *Anderson v. Weston* (1840), 6 Bing. N. C. 293.

<sup>4</sup> *Bounsall v. Harrison* (1836), 1 M. & W. 611.

<sup>5</sup> Cf. *Lefiley v. Mills* (1791), 4 T. R. 170; *Chambliss v. Matthews* (1879), 57 Miss. 306.

<sup>6</sup> See next note.

<sup>7</sup> *Vinton v. King* (1862), 4 Allen (Mass.), 562; *Field v. Tibbetts* (1869), 57 Me. 358.

<sup>8</sup> *Kelley v. Whitney* (1878), 45 Wis. 110; *Cromwell v. County of Sac* (1877), 96 U. S. 51; Cf. *Nat. Bank v. Kirby* (1871), 103 Mass. 497. *Contra. Newell v. Gregg* (1868), 51 Barb. 263.

<sup>9</sup> *La Due v. First Nat. Bank* (1883), 31 Minn. 83 (bank draft overdue in five months); Cf. *Piner v. Clary* (1856), 17 B. Mon. (Ky). 645.

last day of grace to be deemed a transfer of an overdue bill? <sup>When bill deemed overdue.</sup> The affirmative has been held in Massachusetts, without regard to the time of the day when the transfer is made.<sup>1</sup> But the true test would seem to be this: Was the transfer made before the expiration of the time within which due presentment to charge an indorser (Art. 163) could be made and before actual dishonor? If so the bill was not overdue when transferred.<sup>2</sup> By German Exchange Law, Art. 16, a bill is not deemed to be overdue till the time for protesting it has elapsed.

*Bill dishonored by non-acceptance.*—If a person takes a bill before maturity, but with notice that acceptance has been refused, it is uncertain how far he takes it subject to equities which would attach to an overdue bill—*e. g.*, fraud, illegality of consideration, etc.<sup>3</sup> Cf. Art. 191, as to notice of dishonor.

Art. 134. The fact that a bill is overdue is equivalent to notice of all facts relating to it.<sup>4</sup> In other respects an overdue bill which has not been discharged is negotiable as if current.<sup>5</sup> <sup>Negotiation of overdue bill.</sup>

*Explanation 1.*—If there be any fact relating to a bill, notice of which would disentitle a holder who took the bill before maturity, the existence of such fact disentitles a holder who takes the bill after maturity irrespective of notice.<sup>6</sup> Any such disentitling fact is called an "Equity attaching to the bill."<sup>7</sup>

#### ILLUSTRATIONS.

1. B., for an illegal consideration, makes a note payable to C. or order. C. indorses it, when overdue, to D. D. cannot sue B.<sup>8</sup>

<sup>1</sup> *Pine v. Smith* (1858), 11 Gray (Mass.) 38; *Contra, Continental Nat. Bank v. Townsend* (1881), 87 N. Y. 8; Cf. *Fox v. Bank of Kansas City* (1883), 30 Kans. 441.

<sup>2</sup> Cf. *Crosby v. Grant* (1858), 36 N. H. at 277.

<sup>3</sup> Cf. *Andrews v. Pond* (1839), 13 Pet. (U. S.), at 79.

<sup>4</sup> *Brown v. Davies* (1789), 3 T. R. at 82, Buller, J.; *Cripps v. Davis* (1843), 12 M. & E. at 165, Parke, B.

<sup>5</sup> *Leavitt v. Putnam* (1850), 3 N. Y. at 497; *Nat. Bank v. Texas* (1873), 20 Wall. (U. S.) 72; *McSherry v. Brooks* (1876), 46 Md. at 118.

<sup>6</sup> *O'Keefe v. Dunn* (1815), 6 Taunt. at 310 and 315; *Lloyd v. Howard* (1850), 15 Q. B. at 998.

<sup>7</sup> Cf. *Deuters v. Townsend* (1864), 33 L. J. Q. B. at 304, Blackburn, J.

<sup>8</sup> *Amory v. Merewether* (1824), 2 B. & C. 573; *Kittle v. De Lamater* (1874), 3 Neb. 325.

Negotiation of  
overdue bill.

2. A draws a bill on B. payable to his own order. B. accepts the bill subject to a certain condition then verbally agreed on. A. indorses the bill, when overdue, to C. C. takes the bill, subject to the aforesaid condition, although he had no actual notice of it.<sup>1</sup>

*Explanation 2.*—If the holder who held the bill at its maturity had a good title, the fact that a previous holder had a defective title is immaterial.<sup>2</sup> (Cf. Art. 87.)

#### ILLUSTRATION.

B., for an illegal consideration, accepts a bill drawn on him by A. A. indorses it before maturity to C., who takes it for value and without notice. C. indorses the bill, when overdue, to D. D. acquires a good title, for C. had a good title.<sup>3</sup> But C. could not give a good title to A.<sup>4</sup>

*Explanation 3.*—The existence of a set-off or matter of counterclaim against the holder of a bill is not an equity which attaches to the instrument.<sup>5</sup>

#### ILLUSTRATIONS.

C., the holder of a bill accepted by B., is indebted to B. for arrears of rent. If C. sues B., B. can set off the arrears of rent; but if C. indorses the bill when overdue to D. for value, B. cannot set off C.'s debt against D.<sup>6</sup>

NOTE.—If in the instance given C. indorsed the bill to D.

<sup>1</sup> *Holmes v. Kidd* (1858), 28 L. J. Ex. 112, Ex. Ch; *Pecker v. Sawyer* (1852), 24 Vt. 45; *Eggan v. Briggs* (1880), 23 Kans. 710.

<sup>2</sup> *Fairclough v. Pavia* (1854), 9 Exch. 630. *Dunham v. Clogg* (1868), 80 Md. 284; *Hereth v. Bank* (1870), 34 Ind. 380.

<sup>3</sup> *Chalmers v. Lanion* (1808), 1 Camp. 383; *Barlow v. Scott* (1861), 12 Ia. 63.

<sup>4</sup> *Kost v. Bender* (1872), 25 Mich. 516.

<sup>5</sup> *Oulds v. Harrison* (1854), 10 Exch. 572; *Ex parte Swan* (1868), 6 L. R. Eq. 344; *Richardson v. Daily* (1872), 34 Ia. 427; *Davis v. Neligh* (1878), 7 Neb. at 82; *Young v. Shroner* (1876), 80 Pa. St. 463. *Contra*, *Baxter v. Little* (1843), 6 Met. (Mass.) 7; *Armstrong v. Chadwick* (1879), 127 Mass. 156; *Robinson v. Perry* (1882), 73 Me. 168; *Pugh v. Grant* (1882), 85 N. C. 39.

<sup>6</sup> *Trafford v. Hall* (1862), 7 R. L. 104.

without value, D. would sue as a mere trustee for C.; therefore any defense available against C. would be available against D. also. This applies equally to current bills. Cf. Art. 141. Negotiation of  
overdue bill

*Explanation 4.*—If a bill is given for accommodation, the mere absence of consideration is not an equity which attaches to the instrument;<sup>1</sup> but if there be an agreement, express or implied, not to negotiate an accommodation bill after maturity, the agreement constitutes an equity which attaches thereto.<sup>2</sup>

#### ILLUSTRATIONS.

1. B., to accommodate A., accepts a bill drawn on him by the latter, payable one month after date. A., after the bill is overdue, indorses it to C. for value. C. can sue B.<sup>3</sup>

2. B., being willing to accommodate A. with a three months' credit, accepts a bill drawn on him by A. payable three months after date, upon the terms that it is not to be left outstanding after that time. A. discounts the bill with C. when overdue: C. cannot recover against B.<sup>4</sup>

NOTE.—The rule laid down seems obvious. Notice that a bill is an accommodation bill is no defense against a holder for value before maturity; why, then, should the fact be a defense afterward? The point, however, has only been settled in England after long controversy; and in America the authorities are still in conflict, though the decided weight of authority is in favor of holding it an attaching equity, on the ground that there is always implied from the nature of the transaction, an agreement not to negotiate an accommodation bill after maturity. The accommodation party lends his credit for the specified time, and no longer.

*Explanation 5.*—The rights of a person who is not

<sup>1</sup> *Sturtevant v. Ford* (1842), 4 M. & Gr. 101; *Ex parte Swan* (1868), 6 L. R. Eq. 344; *Davis v. Miller* (1857), 14 Grat. 1; *Dunn v. Weston* (1880), 71 Me. 270. *Contra*, *Chester v. Dorr* (1869), 41 N. Y. 279; *Kellogg v. Barton* (1866), 12 Allen (Mass.), 527; *Coghlin v. May* (1861), 17 Cal. 515; *Hoffman v. Foster* (1862), 43 Pa. St. 137; *Simons v. Morris* (1884), 53 Mich. 155.

<sup>2</sup> *Parr v. Jewell* (1855), 16 C. B. 684, Ex. Ch.; *Carruthers v. West* (1847), 11 Q. B. 143, decided on demurrer is not to the contrary; see *ratio decidendi*, per Wightman, J.

<sup>3</sup> *Stein v. Yglesias* (1834), 1 C. M. & R. 565.

<sup>4</sup> Cf. *Parr v. Jewell* (1855), 16 C. B. 684; Cf. *Chester v. Dorr* (1859), 41 N. Y. 279.



Negotiation of  
overdue bill

a party to the bill may constitute an equity attaching thereto, if they arise out of transactions relating to the instrument.<sup>1</sup>

#### ILLUSTRATION.

D., the manager of the "X. Bank," abstracts moneys belonging to the bank, and purchases therewith an overdue bill of exchange accepted by B. This overdue bill he negotiates to E. The "X. Bank," and not E., is entitled to the bill, and if B. becomes bankrupt, the "X. Bank" can prove against his estate.<sup>2</sup>

NOTE.—Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect: they are rather grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper. Part payment, however, may be regarded as an equity which attaches to a bill.<sup>3</sup> The position of a holder who takes a bill when overdue, is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two inquiries. 1. Has what ought to have been done really been done, *i. e.*, has the bill in fact been discharged? 2. If not, why not? Is there any equity attaching thereto? *i. e.*, was the *title* of the person who held it at maturity defective? If his title to the instrument was complete, it is immaterial that for some collateral reason, *e. g.*, as set-off, he could not have enforced the bill against some one or more of the parties liable thereon; Cf. Arts. 88, 230. In France, it seems, no distinction is drawn between overdue and current bills; *Nouguier*, §§ 679–680. By German Exchange Law, Art. 16, the indorser of an overdue bill acquires only the rights of his indorser; Cf. the Scotch Law, under 19 & 20 Vict. c. 60, § 16.

<sup>1</sup> *Ex parte Oriental Bank* (1870), 5 L. R. Ch. 358; Cf. *Lee v. Zagury* (1817), 8 Taunt. 114—by analogy, *Re Gomersall* (1875), 1 L. R. Ch. D. 137. But see *Hibernian Bank v. Everman* (1876), 52 Miss. 500.

<sup>2</sup> *Id.* See as to the limits of the principle, *Warren v. Haight* (1875), 65 N. Y. 171.

<sup>3</sup> *Graves v. Key* (1832), 3 B. & Ad. at 319; *Lanati v. Bayhi* (1879), 31 La. Ann. 229. Hence equity will not compel surrender of an overdue bill, paid but not taken up: *Fowler v. Palmer* (1875), 62 N. Y. 533.

Art. 135. The fact that a bill has been dishonored and an action brought thereon does not restrain its negotiability.<sup>1</sup> After action brought.

#### ILLUSTRATION.

C., the holder of a dishonored bill accepted by B., commences an action against him. Subsequently C. indorses the bill to D., who has notice of the action. D. can sue B. and recover.

NOTE.—If a bill be transferred, after action brought, to embarrass the defendant, his remedy is by application to the Court.<sup>2</sup> The Court, too, has full power over costs. But when judgment is obtained, the bill ceases to be negotiable, as it becomes merged in the judgment.<sup>3</sup>

#### *Rights Acquired by Negotiation:*

Art. 136. The person to whom a bill is negotiated becomes the *de facto* holder (Art. 125) thereof. He thereby acquires the right to sue on the bill in his own name, and the power to further negotiate it.<sup>4</sup> Holder's rights.

NOTE.—The power to negotiate must be distinguished from the right to negotiate. The right to negotiate is an incident of ownership. The power to negotiate is an incident of apparent ownership. Again, the right to sue must be distinguished from the right to recover; that depends on the further question whether the holder is a holder for value (Arts. 83 and 84), and in some cases whether he is also a holder for value without notice (Arts. 85 and 86).

Art. 137. The *de facto* holder of a genuine bill, regular on the face of it, who holds it wrongfully, or who by parting with it is guilty of a fraud, can negotiate it with a good and complete title to a person who takes it before maturity as a *bona fide* holder for value without notice.<sup>5</sup> Cf. Arts. 92 to 97. *De facto* holder can give good title.

<sup>1</sup> *Deuters v. Townsend* (1864), 32 L. J. Q. B. 301; Cf. *Woodward v. Pell* (1868), 4 L. R. Q. B. 55; *Curtis v. Bemis* (1857), 26 Conn. 1.

<sup>2</sup> *Id.* at 302, per Cockburn, J.

<sup>3</sup> *Wooten v. Maulsby* (1873), 69 N. C. at 463.

<sup>4</sup> Cf. *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 380-382.

<sup>5</sup> *Marston v. Allen* (1841), 8 M. & W. at 504, see per Alderson, B., as to the principle.

Patent irregularity.

Art. 138. An irregularity patent on a bill is equivalent to notice of any defect that may be behind it, and deprives the holder of the protection afforded to a *bona fide* holder for value without notice.<sup>1</sup>

#### ILLUSTRATIONS.

1. A., who is in possession of a blank acceptance signed by B., fills it up as a bill for \$100 in the presence of C., inserting his own name as drawer and C.'s name as payee. A. transfers the bill to C. for value. If it appears that A. had no authority to fill up the bill, or that his authority had been revoked, C. cannot recover against B.<sup>2</sup>

2. A. draws a bill on B. payable to his own order. B. accepts. It is afterwards arranged that the bill shall be cancelled. B. accordingly tears it in half. A. subsequently picks up the pieces, joins them together, and indorses the bill to C., who takes it for value and without notice. If the bill is so torn that it appears to have been divided for safe transmission by post, C. can recover; but if it was so torn as to show an intention to cancel it, C. cannot recover.<sup>3</sup>

NOTE.—The rule as to overdue bills (Art. 134), is probably a deduction from the same principle. See, too, Art. 74 as to signature "per proc." and Art. 250 as to alterations. See the distinction between latent and patent defects observed on by Lord Ellenborough and Bayley, J.<sup>4</sup>

Fictitious payee and indorser.

Art. 139. No title can be made to a bill through the indorsement of a fictitious or non-existing person unless the party sued is estopped from setting up the fact. (Cf. Art. 81.)

<sup>1</sup> *Colson v. Arnot* (1874), 57 N. Y. 253; Cf. *Angle v. Ins. Co.* (1875), 92 U. S. at 342; *Freeman's Bank v. Savery* (1879), 127 Mass. at 79.

<sup>2</sup> *Hatch v. Searles* (1854), 2 Sm. & G. 147, Stanway's case; see, too, Conway's case affirmed, 24 L. J. Ch. 22, and *Aude v. Dixon* (1851), 6 Exch. 869.

<sup>3</sup> *Ingham v. Primrose* (1859) 7 C. B. N. S. 82; Cf. *Scholey v. Ramabottom* (1810), 2 Camp. 485; *Reumayne v. Burton* (1860), 2 L. T. N. S. 824.

<sup>4</sup> *Dunn v. O'Keefe* (1816), 5 M. & S. at 286-289; Cf. *Ex parte Dixon* (1876), 4 L. R. Ch. D. at 136, C. A.

## ILLUSTRATIONS.

Fictitious  
payee and in-  
dorsor.

1. A. draws a bill on B. payable to C.'s order. C. is a fictitious person. B. accepts in ignorance of this fact. A. then indorses the bill in blank in C.'s name and discounts it with D., who has notice. D. cannot sue B.<sup>1</sup>

2. A. draws a bill on B. payable to C.'s order. C. is a fictitious person. B., knowing this, accepts. A. indorses the bill in blank in C.'s name, and it is negotiated to D., a *bona fide* holder for value without notice. D. can sue B.<sup>2</sup>

3. B. is indebted to C. By arrangement between them a bill is drawn in the name of A., a deceased person, on B., payable to drawer's order. B. accepts, and the bill is indorsed in A.'s name to C. C. can sue B.<sup>3</sup>

4. A bill purporting to be drawn by A. on B., payable to C.'s order and indorsed by C. in blank is held by D. X. accepts it *supra protest* for A.'s honor. D., who is a *bona fide* holder, sues X. It turns out that A.'s signature was forged, and that C. is a fictitious person. X. is estopped from setting up these facts.<sup>4</sup>

5. B., at the request of X., makes a note payable to C.'s order. C. is a fictitious person, but B. does not know this. X. indorses the note in C.'s name and it is negotiated to D., a *bona fide* holder for value without notice. D. can sue B.<sup>5</sup>

NOTE.—As to the effect of the drawee being a fictitious person, see Art. 2. In France the signature of a fictitious person on a bill constitutes a "supposition de nom," and renders the instrument invalid as a bill in the hands of all parties with notice.<sup>6</sup> The signature of a fictitious person must be distin-

<sup>1</sup> *Hunter v. Jeffery* (1797), Peake Ad. Ca. 146; Cf. *Bennett v. Farrell* (1807), 1 Camp. 129 and 180.

<sup>2</sup> *Gibson v. Minet* (1791), 1 H. Bl. 569, H. L.; Cf. *Gibson v. Hunter* (1794), 2 H. Bl. 288, H. L.; *Farnsworth v. Drake* (1858), 11 Ind. 101; *Forbes v. Espy* (1871), 21 O. St. 474.

<sup>3</sup> *Asphitel v. Bryan* (1863), 32 L. J. Q. B. 91; per Crompton, J., an estoppel on evidence. Affirmed Ex. Ch. 33 L. J. Q. B. 328, per cur., an estoppel by agreement.

<sup>4</sup> *Phillips v. Im Thurn* (1865), 18 C. B. N. S., 694, on demurrer; see 1 L. R. C. P. 463, on evidence.

<sup>5</sup> *Lane v. Krekle* (1867), 22 Ia. 477; Cf. *Ort v. Fowler* (1884), 31 Kans. 478 (maker of note in favor of fictitious firm); *Cooper v. Meyer* (1830), 10 B. & C. 468; *Beeman v. Duck* (1843), 11 M. & W. 251; *Schultz v. Astley* (1836), 2 Bing. N. C. 544.

<sup>6</sup> *Nouguier*, §§ 277, 284-288; Cf. French Code, Art. 112; Italian Code, Art. 198.

Fictitious  
payee and in-  
dorser.

guished from (a); the signature of a real person who uses a fictitious name (Cf. Art. 71, Expl. 2), and (b) the false signature of a real person<sup>1</sup> (Cf. Art. 81).

### *Rights of Action and Proof.*

*De facto*  
holder's right  
of action.

Art. 141. The *de facto* holder of a bill is entitled to maintain an action thereon unless it is shown that he holds the bill adversely to the true owner.<sup>2</sup>

*Explanation 1.*—It is immaterial that the holder never had any interest in the bill,<sup>3</sup> or that he has parted with his interest therein.<sup>4</sup>

*Explanation 2.*—When the holder of a bill sues as agent for another person, or when he sues wholly or in part for the benefit of another person, any defense or set-off available against that person is available *pro tanto* against the holder.<sup>5</sup> (Cf. Art. 88.)

### ILLUSTRATIONS.

1. C., the holder of a bill, indorses it to D. for collection. D. can sue on it, but any defense available against C. is available against D.<sup>6</sup>

2. D. is the holder of a dishonored bill for \$100 indorsed by C. C. pays D. \$60. D. sues the acceptor. As to \$60, D. sues

<sup>1</sup> See *Rogers v. Ware* (1873), 2 Neb. 29; *Dana v. Underwood* (1837), 19 Pick. (Mass.) 99; *Maniort v. Roberts* (1855), 4 E. D. Sm. (N. Y.) 83.

<sup>2</sup> *Jones v. Broadhurst* (1850), 9 C. B. 173; *Agra Bank v. Leighton* (1866), 2 L. R. Ex. at 63-65; *Wells v. Schoonover* (1872), 9 Heisk. (Tenn.) 805. See Art. 125, *de facto* holder defined.

<sup>3</sup> *Law v. Parnell* (1859), 7 C. B. N. S. 282; *Wheeler v. Johnson* (1867), 97 Mass. 39; *Caldwell v. Lawrence* (1876), 84 Ill. 161.

<sup>4</sup> *Williams v. James* (1850), 15 Q. B. 498; *Poirier v. Morris* (1853) 2 E. & B. 89; Cf. *Megrath v. Gray* (1874), 9 L. R. C. P. 216; *Richardson v. Lincoln* (1842), 5 Met. (Mass.) 201.

<sup>5</sup> *Lee v. Zagury* (1817), 8 Taunt. 114; *Royce v. Barnes* (1846), 11 Met. (Mass.) 276; *Agra Bank v. Leighton* (1866), 2 L. R. Ex. 56; *Re Anglo-Greek Nav. Co.* (1869), 4 L. R. Ch. 174; *Pothier*, No. 41; Cf. *Becher-vaise v. Lewis* (1872), 7 L. R. C. P. 372.

<sup>6</sup> *De la Chaumette v. Bank* (1829), 9 B. & C. 208, as explained by *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 164, Ex. Ch.; *Royce v. Barnes*, *supra*; *Boyd v. Corbitt* (1877), 37 Mich. 52; *Cummings v. Kohn* (1882), 12 Mo. App. 585.

as trustee for C., and only as to \$40 on his own account. As *De facto* holder's right regards \$60, any set-off which the acceptor may have against of action. C. is equally available against D.<sup>1</sup>

NOTE.—Statutes have been passed in several States requiring all actions to be prosecuted by the real party in interest, modifying the rules here laid down.

Art. 142. Subject to Arts. 98 and 99, when a bill is payable to a particular person or persons, or to his or their order, an action thereon must be brought in the name of such person or persons.<sup>2</sup> Action on bill payable specially.

#### ILLUSTRATIONS.

1. A bill is specially indorsed to the firm of "D. & Co." An action on it must be brought in the name of the firm. The managing partner cannot sue on it in his own name.

2. A bill is specially indorsed to D., a partner in the firm of X. & Co., in payment of a debt due to the firm. An action on it must be brought in D.'s name, and not in the name of the firm.<sup>3</sup>

NOTE.—In the case given in Illust. 1, the managing partner might indorse the bill in the firm's name to himself and then sue. Cf. Art. 119, n., as to striking out indorsements.

Art. 143. Subject to Art. 141, when a bill is payable to bearer an action thereon may be brought in the name of any person who has either the actual or the constructive possession thereof. Action on bill payable to bearer.

#### ILLUSTRATIONS.

1. C., the holder of a bill, indorses it in blank to D. to collect it for him. Either C. or D. may sue the acceptor.<sup>4</sup>

2. A bill accepted by B. is indorsed in blank by C. D., E.

<sup>1</sup> *Thornton v. Maynard* (1875), 10 L. R. C. P. 695.

<sup>2</sup> *Attwood v. Rattenbury* (1822), 6 Moore at 583; *Pease v. Hirst* (1829), 10 B. & C. 122; *Nichols v. Gross* (1875), 26 O. St. 425; *Noxon v. Smith* (1879), 127 Mass. 485; *Barry Co. v. McGlothlin* (1854), 19 Mo. 307 ("Pay D. for the use of X.").

<sup>3</sup> *Bauden v. Howell* (1841), 3 M. & Gr. 638.

<sup>4</sup> *Clerk v. Pigot* (1699), 12 Mod. 193; Cf. *Stone v. Butt* (1834), 2 Cr. & M. 416. But that D. cannot sue, see *Best v. Bank* (1875), 76 Ill. 608 (statute).

Action on bill  
payable to  
bearer.

and F. bring an action on the bill against B. They can recover, although there is no evidence to show that they are partners, or what the nature of their joint interest is.<sup>1</sup>

3. A bill is indorsed in blank to a firm. Any one of the partners may bring an action on it in his own name.<sup>2</sup>

4. A bill indorsed in blank is handed to the manager of a company in payment of a debt due to the company. The manager may sue on it in his own name.<sup>3</sup>

5. A bill indorsed in blank is given to D.'s attorney, who commences an action on it against the acceptor in D.'s name. D. knows nothing of the matter, but after the action has proceeded some way he is told of it, and then gives his consent. D. can maintain the action.<sup>4</sup>

6. D., the holder of a bill indorsed in blank, does not wish to sue on it in his own name. He accordingly asks E. to sue on it. E. consents. E. gets a copy of the bill, and it is agreed that he shall have the original when wanted. E. commences an action against the acceptor, and after action brought he gets the bill. E. cannot maintain this action, for at the time he began it he had neither the actual nor the constructive possession of the bill.<sup>5</sup>

*Explanation.*—A constructive possession jointly with others is sufficient to entitle the possessor to sue alone.

#### ILLUSTRATION.

A note payable to bearer is handed to the solicitor of a loan society in payment of a debt due to the society. D., a member of the society, instructs the solicitor to commence an ac-

<sup>1</sup> *Ord v. Portal* (1812), 8 Camp. 239; Cf. *Rordunz v. Leach* (1816), 1 Stark. 446; *Low v. Copestake* (1828), 3 C. & P. 300.

<sup>2</sup> *Lindley*, p. 302; *Altwood v. Rattenbury* (1822), 6 Moore, 579; *Wood v. Connop* (1843), 5 Q. B. 292, as to joint holders; *Conover v. Earl* (1868), 26 Ia. 168, as to holders in common.

<sup>3</sup> *Law v. Parnell* (1859), 7 C. B. N. S. 262; Cf. *Pettee v. Prout* (1855), 3 Gray (Mass.) 502.

<sup>4</sup> *Ancona v. Marks* (1862), 31 L. J. Ex. 163; *Craig v. Twomey* (1860), 14 Gray (Mass.), 486.

<sup>5</sup> *Emmett v. Tottenham* (1853), 8 Exch. 884; Cf. *Hovey v. Sebring* (1872), 24 Mich. at 233. But cf. *Austin v. Birchard* (1859), 31 Vt. 529.

tion on it in his (D.'s) name against the maker. D. can maintain this action.<sup>1</sup> Action on bill payable to bearer.

NOTE.—As to constructive possession, see Art. 53, n.

Art. 144. If a bill, negotiable by delivery,<sup>2</sup> is lost, Action on lost bill no action at law can be maintained thereon,<sup>3</sup> though lost when overdue,<sup>4</sup> unless

- (1.) The bill is shown to have been destroyed;<sup>5</sup> or
- (2.) The bill is shown to have come into the possession of the defendant since the loss;<sup>6</sup> or
- (3.) The defendant is protected from future liability by the statute of limitations.<sup>7</sup>

NOTE.—This matter is now regulated by statute in England,<sup>8</sup> and in some of the States. Unless the defendant runs no risk of future liability to a *bona fide* holder, by non-surrender of the instrument, the remedy of the plaintiff is solely in equity, where the defendant's rights can be approximately protected by a bond of indemnity.

<sup>1</sup> *Jenkins v. Tongue* (1860), 29 L. J. Ex. 147.

<sup>2</sup> *Aliter*, if non negotiable—*Hough v. Barton* (1848), 20 Vt. 455; *Wain v. Bailey* (1839), 10 A. & E. 616; *Price v. Dunlap* (1855), 5 Cal. 483. Or negotiable only by indorsement—*Lazell v. Lazell* (1840), 12 Vt. at 449; *Wright v. Wright* (1873), 54 N. Y. 437; *Depew v. Whelan* (1843), 6 Blackf. (Ind.) 435; *Rogers v. Miller* (1843), 4 Scam. (Ill.) 833. *Contra* in England, *Crowe v. Clay* (1854), 9 Exch. 604.

<sup>3</sup> *Hansard v. Robinson* (1827), 7 B. & C. 90; *Thayer v. King* (1846), 15 O. 242; *Rowley v. Ball* (1824), 3 Cow. (N. Y.) 303. *Contra*, in Mass., plaintiff being compelled to give bond of indemnity, *Fales v. Russell* (1835), 16 Pick. (Mass.) 315; *Tucker v. Tucker* (1875), 119 Mass. 79; unless defendant is indorser, *Tuttle v. Standish* (1862), 4 Allen (Mass.) 481. See, also, *Reener v. Bank* (1824), 9 Wheat. (U. S.) 581; *Welton v. Adams* (1854), 4 Cal. 37.

<sup>4</sup> *Rowley v. Ball*, *supra*; *Swift v. Sterens* (1831), 8 Conn. at 436. *Contra*, *Thayer v. King*, (1846), 15 O. 242.

<sup>5</sup> *Wright v. Maidstone* (1855), 1 Kay & J. 701; *DeArts v. Leggett* (1858), 16 N. Y. 582; *Baldwin v. Wade* (1878), 20 Kans. 251; *Hagerstown v. Adams Ex. Co.*, (1862), 45 Pa. St. 419 (applied to bank notes); but see *Tower v. Bank* (1862), 3 Allen (Mass.), 387. No recovery if voluntarily destroyed, *Booth v. Smith* (1876), 3 Woods (C. Ct.), 19.

<sup>6</sup> *Smith v. McClure* (1804), 5 East, 476; *Garlock v. Geortner* (1831), 7 Wend. (N. Y.) 198.

<sup>7</sup> *Torrey v. Foss* (1855), 40 Me. 74; *Moses v. Trice* (1871), 21 Grat. (Va.) 556.

<sup>8</sup> British Code, § 70. Cf. *King v. Zimmerman* (1871), 6 L. R. C. P. 466, and see *Wright v. Maidstone* (1855), 1 Kay & J. 701.



## CHAPTER V.

### DUTIES OF THE HOLDER.

#### *Effect of Omission.*

Effect on consideration of omission of holder's duties.

Art. 146. When a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties as to presentment for acceptance or payment, protest, or notice of dishonor, such party is also discharged from liability on the consideration for which the bill was given.<sup>1</sup>

NOTE.—The holder's omission, without lawful excuse, to perform his duties with reference to a bill is commonly called "laches."

#### *Presentment for Acceptance.*

When necessary or optional.

Art. 147. Presentment for acceptance is necessary in the case of a bill of exchange payable at or after sight. In other cases, in the absence of express stipulation, it is optional.<sup>2</sup>

#### ILLUSTRATION.

A. draws a bill on B. payable at the "X. bank" three months after date. Presentment to B. for acceptance is not necessary. It is sufficient to present the bill for payment when due at the X. bank.<sup>3</sup>

NOTE.—Although presentment for acceptance is unnecessary on date bills as between the holder and drawer or indorsers, an agent for collection must use due diligence in presenting

<sup>1</sup> *Byles*, pp. 219 and 297, and *post*, Arts. 160, 190; Cf. *Crowe v. Clay* (1854), 9 Exch. 604.

<sup>2</sup> *Ramchurn v. Radakissen* (1854), 9 Moore P. C. at 65, 66; *Allen v. Suydam* (1838), 20 Wend. (N. Y.) at 323; *Cribbs v. Adams* (1859), 13 Gray (Mass.), 597; *Bank v. Triplett* (1828), 1 Pet. (U. S.) 25.

<sup>3</sup> *Walker v. Stetson* (1869), 19 O. St. 400.

them for acceptance, or he will be liable to his principal for damage resulting from his negligence,<sup>1</sup> as where he takes the individual acceptance of an officer of the corporation upon which the draft is drawn, instead of the company's acceptance.<sup>2</sup> "Sight" in a bill means acceptance, and as sight bills are, in the absence of statute, entitled to grace, presentment for acceptance is necessary to fix the day of maturity. Suppose A. draws a bill on B. in Liverpool, payable in London, but not saying where, is not presentment for acceptance necessary? It would be so in France, *Nouguier*, § 1068. By German Exchange Law, Art. 24, when a bill is drawn payable at the house of a third person, the drawer may insert a stipulation requiring presentment for acceptance. In France it seems the drawer or indorser of any bill may insert such a stipulation, *Nouguier*, §§ 464-469.

Art. 148. Due presentment for acceptance is a condition precedent to the exercise by the holder of the rights which arise on dishonor by non-acceptance. (Cf. Art. 157.)

*Explanation.*—"Due presentment for acceptance" means presentment in accordance with Arts. 149 to 154.

NOTE.—"Presentment" means actual exhibition of the bill, and it is not duly presented if the holder merely informs drawee that he has it in his possession, but does not produce it, though the drawee says he will not accept it.<sup>3</sup> Subject to Art. 150, Expl. 3, the question of due presentment is only material when acceptance cannot be obtained. If acceptance is obtained the informality of the presentment is immaterial. It is clear that the rules as to presentment for payment do not apply in their entirety to presentment for acceptance. Cf. Art. 155, n.

Art. 149. Any person in possession of a bill of exchange may present it for acceptance.<sup>4</sup>

Art. 150. The holder of a bill of exchange payable at or after sight is bound either to negotiate it away

<sup>1</sup> As to date bill, *Allen v. Suydam* (1838), 20 Wend. (N. Y.) 321; *Pothier*, No. 128; *Nouguier*, § 462. As to sight bills, *Bank of Van Diemen's Land v. Bank of Victoria* (1871), 3 L. R. P. C. at 542. Cf. Art. 164, n.

<sup>2</sup> *Exchange Nat. Bank v. Third Nat. Bank of N. Y.* (1884), 112 U. S. 276.

<sup>3</sup> *Bank v. Willard* (1842), 5 Met. (Mass.) at 222.

<sup>4</sup> *Nouguier*, § 462; German Exchange Law, Art. 18; *Thomson*, p. 282;

Time for presenting bill after sight.

or to present it for acceptance within a reasonable time. If he omit to do so the drawer and prior indorsers are discharged.<sup>1</sup>

*Explanation 1.*—Reasonable time is a mixed question of law and fact.<sup>2</sup>

*Explanation 2.*—In determining what is a reasonable time regard is to be had to the nature of the bill, the usage of trade with respect to similar bills, and the circumstances of the particular case looking to the interests both of the holder and the drawer.<sup>3</sup>

#### ILLUSTRATIONS.

1. A. in Windsor draws a bill on B. in London, payable one month after sight. The holder keeps it four days before presenting it for acceptance. It is then dishonored. This may not be an unreasonable delay.<sup>4</sup>

2. A. in London draws a bill on B. in Rio, payable sixty days after sight. The payee holds it back for four months, during which time Rio bills are at a discount. He then negotiates it. This may not be an unreasonable delay.<sup>5</sup>

3. A. in Newfoundland draws a bill (*in a set*) on B. in London, payable ninety days after sight. The payee holds it back for two months and then forwards it for presentment. No reason for holding back is shown. This may be an unreasonable delay.<sup>6</sup>

Cf. *Morrison v. Buchanan* (1833), 6 C. & P. 18, and Art. 28, as to the parts of a set.

<sup>1</sup> *Mellish v. Rawdon* (1832), 9 Bing. 416; *Ramchurn v. Radakissen* (1854), 9 Moore P. C. 46; *Wallace v. Agry* (1827), 4 Mason (C. Ct.), 336; *Strong v. King* (1864), 35 Ill. 9; Cf. *Goupy v. Harden* (1816), 7 Taunt. at 163. Cf. Art. 146.

<sup>2</sup> *Id.*; Cf. *Prescott Bank v. Caverly* (1856), 7 Gray (Mass.), at 221; *Walsh v. Dart* (1868), 23 Wis. 334. *Contra*—law. *Aymar v. Beers* (1827), 7 Cow. (N. Y.) 705; *Himmelman v. Hotaling* (1870), 40 Cal. 111; fact, *Wallace v. Agry, supra*; *Pryor v. Bowman* (1874), 38 Ia. 92.

<sup>3</sup> *Id.*; *Wallace v. Agry, supra*.

<sup>4</sup> *Fry v. Hill* (1817), 7 Taunt. 395; Cf. *Shute v. Robins* (1828), 2 C. & P. 80. See *Gowan v. Jackson* (1822), 20 Johns. (N. Y.) 176 (six months in circulation).

<sup>5</sup> *Mellish v. Rawdon, supra*.

<sup>6</sup> *Straker v. Graham* (1839), 4 M. & W. 721; Cf. *Dumont v. Pope* (1845), 7 Blackf. (Ind.) 367; Art. 28.

4. A. in Calcutta draws a bill on B. in Hong Kong, payable <sup>Time for pre-</sup> sixty days after sight. The holder retains it for five months, <sup>senting bill</sup> after sight, during which time China bills are at a discount. He then negotiates it. This may be an unreasonable delay.<sup>1</sup>

*Explanation 3.*—When there is unreasonable delay the drawer and prior indorsers are (probably) discharged, although the bill when presented is accepted.<sup>2</sup>

#### ILLUSTRATION.

A. draws a bill on B. payable to C. three months after sight. C. holds it back for an unreasonable time. He then presents it and it is accepted. Before it is due the acceptor fails. A. is discharged.<sup>3</sup>

NOTE.—*Qu.* What, if any, is the liability of a person who retains a bill an unreasonable time and then negotiates it without indorsement? Again, does not negotiation within a reasonable time, *toties quoties*, excuse presentment, or is there any limit? By German Exchange Law, Art. 19, when a bill payable after sight does not fix a time for presentment, it must be presented within two years of its date. By French Code, Art. 160, as amended by the law of May 3, 1862, bills payable after sight are divided into classes according to the places where they are drawn and payable, and definite limits of time for presentment are fixed, varying from three months to one year—*e. g.*, bill drawn in Paris on London must be presented for acceptance within three months. The effect of this conflict of laws has not been considered.

Art. 151. A bill of exchange, payable otherwise <sup>Time for pre-</sup> than at or after sight, may be presented for accept- <sup>senting other</sup> <sup>bills.</sup> ance at any time before maturity.<sup>4</sup>

NOTE.—In the case of a bill which is due or payable on demand, presentment for acceptance is merged in presentment for payment. In the case of a bill payable after date, it has been held in New York (the only decision on the point in Eng-

<sup>1</sup> *Ramchurn v. Radakissen* (1854), 9 Moore P. C. 46; Cf. *Godfray v. Coulman* (1859), 13 Moore P. C. 11; *Phoenix Ins. Co. v. Allen* (1863), 11 Mich. 501.

<sup>2</sup> *Straker v. Graham* (1839), 4 M. & W. 721.

<sup>3</sup> *O'Keefe v. Dunn* (1815), 6 Taunt. 307; *Touensley v. Sumrall* (1829), 2 Pet. (U. S.) 170; German Exchange Law, Art. 18; *Nouguier*, § 456.

Time for presenting other bills.

land or America) that it may be presented for *acceptance* on the very day it becomes due, and if refused, it may be treated as dishonored either for non-acceptance or non-payment.<sup>1</sup> Considering the difference in the rules which govern the two kinds of presentment, this might have important consequences. See, also, Art. 34. When a bill is presented for payment, the drawee instead of paying it, often accepts it payable at his banker's. This is in effect a payment by check,<sup>2</sup> which the holder might refuse to take.

Day and hour.

Art. 152. Presentment for acceptance must (probably) be made on a business day, and at a reasonable hour.<sup>3</sup>

*Explanation 1.*—When the drawee is a trader reasonable hours mean the ordinary business hours of his trade.<sup>4</sup>

#### ILLUSTRATIONS.

Bill drawn on a banker is presented for acceptance after banking hours and the bank is found closed. The bill cannot be treated as dishonored.

NOTE.—It has been held, moreover, that if a bill payable after date be presented for acceptance at the house of the drawee, his absence when presented, though at a reasonable hour, would not justify a protest for non-acceptance.<sup>5</sup> Probably if presentment was made on a non-business day, or at an unreasonable hour, and the drawee refused acceptance on some other ground, the bill might be treated as dishonored.

To whom and where.

Art. 153. Presentment for acceptance must be made to the drawee personally, or to some person who has authority to accept or refuse acceptance on his behalf.<sup>6</sup>

*Explanation 1.*—When a bill of exchange is drawn

<sup>1</sup> *Plato v. Reynolds* (1863), 27 N. Y. 586, Marvin, J., dissenting.

<sup>2</sup> Cf. *Bishop v. Chitty* (1742), 2 Stra. 1195.

<sup>3</sup> *Nelson v. Fotherall* (1836), 7 Leigh (Va.), 179; *Chitty*, p. 199; *Byles*, p. 182. Cf. Art. 163, and *Startup v. Macdonald* (1843), 6 M. & Gr. at 624.

<sup>4</sup> Cf. *Nelson v. Fotherall* (*supra*), at 194, and Art. 163.

<sup>5</sup> *Bank v. Triplett* (1828), 1 Pet. (U. S.) 25, at 35.

<sup>6</sup> *Cheek v. Roper* (1804), 5 Esp. 175; *Sharpe v. Drew* (1857), 9 Ind. 281.

payable at the house or place of business of some person other than the drawee, presentment for acceptance at such house or place is not a presentment to the drawee.<sup>1</sup>

*Explanation 2.*—When the drawee is dead presentment must (perhaps) be made to his executor or administrator.<sup>2</sup>

NOTE.—The law on this point is not yet settled.

*Explanation 3.*—If a bill is drawn on two or more persons, presentment for acceptance to one is (probably) sufficient, whether partners or not.<sup>3</sup>

Art. 154. The person who presents a bill of exchange for acceptance must deliver it up to the drawee if required so to do. The drawee is entitled to retain it for twenty-four hours, but after the expiration of this time he must re-deliver it accepted or unaccepted.<sup>4</sup>

Drawee may retain bill twenty-four hours.

*Explanation 1.*—In reckoning the twenty-four hours non-business days must be excluded.<sup>5</sup>

*Explanation 2.*—If after the expiration of the twenty-four hours the drawee refuses to re-deliver the bill it must be treated as dishonored in order to preserve the holder's right of recourse against antecedent parties.<sup>6</sup>

Art. 155. Presentment for acceptance is excused, and a bill of exchange may be treated as dishonored by non-acceptance:<sup>7</sup>

Presentment for acceptance, when excused.

<sup>1</sup> *Chitty*, p. 196; Cf. Art. 155. n.

<sup>2</sup> Cf. *Smith v. N. S. Wales Bank* (1872), 8 Moore, P. C. N. S. at 431-462, per Mellish, L. J. But see *Daniel*, § 458. French Code, Art. 163.

<sup>3</sup> *Daniel*, § 455.

<sup>4</sup> *Bank of Van Dieman's Land v. Bank of Victoria* (1871), 3 L. R. P. C. at 542-543; *Case v. Burt* (1866), 15 Mich. 82; *Overman v. Bank* (1864), 31 N. J. L. at 565; *Story*, § 237; French Code, Art. 125.

<sup>5</sup> Id. see at 546-547, as to the effect of a short day—e. g., Saturday.

<sup>6</sup> Id.; Cf. *Ingram v. Forster* (1805), 2 J. P. Smith, 242; German Exchange Law, Art. 20.

Presentment  
for acceptance  
when excused.

1. When the drawee is discovered to be a fictitious person<sup>1</sup> or (perhaps) a person not having capacity to contract.<sup>2</sup>

2. (Probably) when, after the exercise of reasonable diligence, presentment cannot be effected.<sup>3</sup>

3. When the drawee is not in funds, and the drawer has no reasonable expectation that the bill will be accepted.<sup>4</sup>

NOTE.—In *Anon* (1700), 1 Ld. Raym. 743, where the drawee had absconded, the bill was merely protested for better security, and at maturity it was again protested for non-payment. This seems to be the only case in point, but it can hardly be a binding precedent now that it is settled that a right of action at once arises on dishonor by non-acceptance (Art. 157). At the same time it is clear that considerations applicable to presentment for payment do not apply in their entirety to presentment for acceptance. Speaking generally, presentment for acceptance must be personal, while presentment for payment must be local. A bill must be presented for payment where the money is. Any one can then hand over the money (Cf. Art. 167). A bill must be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill (Cf. Art. 154). Again (except in the case of demand drafts) the day for payment is a fixed day, but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. If the drawee be a trader, it is clear that the bill should be presented for acceptance at his place of business, but suppose the drawee is not there, what further steps must be taken? What diligence must be used before the bill can be treated as dishonored? The immediate right of action which arises on non-acceptance is an exceptional right.<sup>5</sup> How far ought it to be favored? It is one thing to excuse delay where presentment is necessary;

<sup>1</sup> Cf. *Smith v. Bellamy* (1817), 2 Stark. 223.

<sup>2</sup> *Byles* (12th ed.), p. 187; no decision in point.

<sup>3</sup> *Byles* (12th ed.), p. 183; *Chitty*, p. 199; *Brooks' Notary*, 4th ed. p. 79; no decision in point. Cf. *Smith v. N. S. Wales Bank* (1872), 8 Moore P. C. N. S. at 461-463. Delay excused by sickness or unavoidable accident, *Aymar v. Beers* (1827), 7 Cow. (N. Y.) 705; Cf. Art. 169.

<sup>4</sup> *Robinson v. Ames* (1822), 20 Johns. (N. Y.) 146; Cf. *Ex parte Tondeur* (1867), 5 L. R. Eq. at 165; Art. 168.

<sup>5</sup> Cf. Art. 157, n., and *Dunn v. O'Keefe* (1816), 5 M. & S. at 289, Abbott, C. J.

another to treat a bill as dishonored where presentment is optional. Presentment, etc.

Art. 156. A bill of exchange is dishonored by "non-acceptance," (1) when it is duly presented for acceptance, and an acceptance in due form is refused or cannot be obtained, or (2) when presentment for acceptance is excused, and the bill is not accepted. Dishonor by non-acceptance.

Art. 157. Subject to Art. 48, when a bill of exchange is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, provided that the proper proceedings on dishonor be taken.<sup>1</sup> Consequence of dishonor by non-acceptance.

#### ILLUSTRATION.

A. draws a bill on B. payable to C. three months after date. Two days after it is drawn C. presents the bill to B. for acceptance. B. dishonors it. C. can at once sue A. on the bill. A. need not wait till it matures.

NOTE.—This rule seems peculiar to English and American law. On the continent the holder can only protest the bill for non-acceptance and demand security from the drawer and indorsers. When the bill matures he must again present it for payment. His right of action arises on non-payment.<sup>2</sup> The effect of this conflict of laws has not been judicially considered.

*Explanation.*—The holder of a bill of exchange which has been dishonored by non-acceptance may re-present it to the drawee for acceptance or payment, though he is not bound so to do.<sup>3</sup>

NOTE.—Suppose a bill is presented for acceptance and dis-

<sup>1</sup> *Whitehead v. Walker* (1842), 9 M. & W. at 516; *Watson v. Tarpley* (1855), 18 How. (U. S.) 517; *Walsh v. Blatchley* (1853), 6 Wis. 422. Notice of dishonor necessary, Art. 189.

<sup>2</sup> French Code, Arts. 119-120; German Exchange Law, Arts. 25-28. Also the law in Penn.: *Read v. Adams* (1821), 6 Serg. & R. 356.

<sup>3</sup> *Hickling v. Hardey* (1817), 7 Taunt. 312; *Lenox v. Cook* (1812), 8 Mass. 460.



Consequence  
of dishonor by  
non-acceptance.

honored. The holder gives no notice of dishonor, but re-presents the bill a few days after and gets it accepted. It is dishonored by non-payment. Are the drawer and indorsers discharged as regards such holder? A subsequent holder without notice would not be affected (Art. 191). The proper course is to give notice of dishonor, and at the same time to intimate an intention to re-present.

### *Duties as to Qualified Acceptances.*

Holder's right  
to general acceptance.

Art. 158. The holder of a bill of exchange is entitled to have it accepted generally. If a general acceptance be refused and a qualified acceptance is offered or given, the bill may be treated as dishonored.<sup>1</sup>

NOTE.—As to general and qualified acceptances, see Arts. 38, 39. By German Exchange Law, Art. 20, if the acceptor refuses to date his acceptance on a bill payable after sight, it may be treated as dishonored.

Notice of  
qualified acceptance.

Art. 159. If the holder of a bill of exchange elect to take a qualified acceptance, he must give notice of the qualification to antecedent parties.<sup>2</sup>

NOTE.—As to the effect of the notice when given, see Art. 40. A foreign bill should be protested as to the variation. The notice given must be notice of qualification, not notice of dishonor. If the holder give notice of dishonor, he cannot take advantage of the acceptance.<sup>3</sup>

### *Presentment for Payment to Charge Drawer and Indorsers.*

Necessity for  
presentment.

Art. 160. Due presentment for payment, unless

<sup>1</sup> *Boehm v. Garcias* (1808), 1 Camp. 425; *Gammon v. Schmoll* (1814), 5 Taunt. at 353; *Ford v. Angelrodt* (1865), 37 Mo. 50; Cf. French Code, Art. 124; German Exchange Law, Art. 22.

<sup>2</sup> Cf. *Sebag v. Abithol* (1816), 4 M. & S. at 466, Bayley, J.; *Whitehead v. Walker* (1842), 9 M. & W. at 509; *Walker v. Bank* (1854), 9 N. Y. 582.

<sup>3</sup> Cf. *Bentinck v. Dorrien* (1805), 6 East, 199.

excused,<sup>1</sup> is a condition precedent to the liability of the drawer or indorser of a bill of exchange.<sup>2</sup> The omission by the holder to make due presentment deprives him of any right of action on the consideration, as well as of his right of recourse on the instrument.<sup>3</sup>

*Explanation.*—Due presentment for payment means presentment in accordance with Arts. 160 (a) to 167.

*NOTE.*—The rules applicable to the drawer or indorser of a bill apply equally to the indorser of a note<sup>4</sup> or check,<sup>5</sup> but they are modified as to time as regards the *drawer* of a check (Art. 258). See Art. 155, n., presentment for payment and presentment for acceptance contrasted. According to French Code, Art. 161, a bill must be presented for payment on the day it falls due, but it seems no penalty follows the omission to present, provided the bill be duly protested on the following day: *Nouguier*, § 1076. Practically, then, protest is substituted for presentment for payment. Again, a distinction is drawn between the drawer and the indorsers. Omission duly to protest discharges the indorsers, but the drawer is not discharged unless he shows affirmatively that the drawee or acceptor had funds to meet the bill.<sup>6</sup>

Art. 160 (a). When a bill is presented for payment, payment must be demanded according to the tenor of the bill.<sup>7</sup>

#### ILLUSTRATION.

Holder presents a bill legally payable in silver, and demands payment in gold coin. This is not a due presentment.<sup>8</sup>

Art. 161. A bill payable at or after sight or at a

At what time  
bill payable in  
future.

<sup>1</sup> Cf. Arts. 200, 201, as to excuses.

<sup>2</sup> Cf. *Rowe v. Young* (1820), 2 Bligh. H. L. at 467; *Wood v. Surralls* (1878), 89 Ill. 107; German Exchange Law, Arts. 41 and 91.

<sup>3</sup> *Soward v. Palmer* (1818), 8 Taunt. 277; *Peacock v. Purcell* (1863), 32 L. J. C. P. 266; *Smith v. Miller* (1870), 43 N. Y. 171; *Adams v. Boyd* (1878), 33 Ark. 33.

<sup>4</sup> (Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at 262-263, Ex. Ch.

<sup>5</sup> *Harker v. Anderson* (1839), 21 Wend. (N. Y.) 372.

<sup>6</sup> French Code, Arts. 117, 170; *Nouguier*, §§ 1147-1165.

<sup>7</sup> *Simpson v. Pacific Ins. Co.* (1872), 44 Cal. 139, at 143.

<sup>8</sup> *Langenberger v. Kroeger* (1874), 48 Cal. 147.

At what time  
bill, etc.

future time (Art. 19) must be presented for payment on the day that it falls due,<sup>1</sup> as determined by Art. 20.

Bill of ex-  
change payable  
on demand.

Art. 162. A bill of exchange payable on demand (Art. 18) must be presented for payment within a reasonable time.<sup>2</sup>

NOTE.—There seems to be no English decision in point. The cases have arisen either on checks or notes. A check is intended for prompt presentment and not for negotiation (Art. 254), so it is doubtful how far the cases on checks apply, even to an inland bill.<sup>3</sup> A note, on the other hand, is a continuing security (Art. 285). Under the continental codes, a bill payable at sight must be presented for payment within the same limit of time that a bill payable after sight must be presented for acceptance. This seems the true principle; see Art. 150 on this point.

*Explanation.*—The holder of a bill who indorses it when overdue, is to be deemed an indorser of a bill payable on demand, within the meaning of this Article.<sup>4</sup>

#### ILLUSTRATION.

C. is the holder of an overdue bill payable six months after date. He indorses it to D. D. must present it to the acceptor for payment within a reasonable time in order to hold C. as indorser.<sup>5</sup>

Reasonable  
hours.

Art. 163. Presentment for payment must be made during reasonable hours.<sup>6</sup>

<sup>1</sup>*Philpot v. Bryant* (1828), 4 Bing. at 720; *Windham Bank v. Norton* (1852), 22 Conn. 213; *Barnes v. Vaughan* (1859), 6 R. 1. 259, French Code, Art. 161; see e. g., *Wiffen v. Roberts* (1795), 1 Esp. 262, presentment on second day of grace; *Prideaux v. Collier* (1817), 2 Stark. 58, presentment on day after maturity. Presentment necessary at the time each installment of bill falls due, *Eastman v. Furman* (1864), 24 Cal. 379.

<sup>2</sup>*Byles*, p. 211; *Story*, § 325. Reasonable time: *Nat. Banking Co. v. Bank* (1869), 63 Pa. St. 404; *Muncy Dist. v. Commonwealth* (1877), 84 Pa. St. 464. Unreasonable time: *Chambers v. Hill* (1863), 26 Tex. 42. Same rule as to bills at sight without grace: *Montelius v. Charles* (1875), 76 Ill. 303; *Walsh v. Dart* (1868), 23 Wis. 384.

<sup>3</sup>But see *Harker v. Anderson* (1839), 31 Wend. (N. Y.) 372.

<sup>4</sup>*Bishop v. Dexter* (1818), 2 Conn. 419; *Pryor v. Bowman* (1874), 38 Ia. 92; *Light v. Kingsbury* (1872), 50 Me. 331; *Beebe v. Brooks* (1859), 12 Cal. 308.

<sup>5</sup>*Swartz v. Redfield* (1874), 13 Kans. 550.

<sup>6</sup>*Wilkins v. Jadis* (1831), 2 B. & Ad. 183.

*Explanation 1.*—When the payor is a trader, and the bill is payable at his place of business, reasonable hours mean the ordinary business hours of his trade.<sup>1</sup>

## ILLUSTRATIONS.

1. Bill accepted payable at a bank. It must be presented during banking hours.<sup>2</sup>

2. Bill drawn on a merchant is presented for payment at his counting-house at 6.30. This may be a reasonable hour.<sup>3</sup>

3. Bill payable at the private residence of the payor is presented for payment at 8 p. m. This is a reasonable hour.<sup>4</sup>

4. Bill payable generally is presented for payment at 11 p. m. at the acceptor's private residence. This is an unreasonable hour.<sup>5</sup>

NOTE.—The reasonableness of the hour must depend on whether the payor's place of business is also his residence. He is not bound to stay at his place of business after the usual hour. When a bill is payable at the payor's residence, probably a presentment up to bed-time would be sufficient.<sup>6</sup>

*Explanation 2.*—When presentment is made at an unreasonable hour, but payment is refused on some other ground, the bill is deemed to have been duly presented.<sup>7</sup>

## ILLUSTRATION.

Bill payable at bank is presented after banking hours to the cashier, who is found at the bank, and he merely replies, "no funds." This is a due presentment.<sup>8</sup>

<sup>1</sup> *Elford v. Teed* (1813), 1 M. & S. 28; Cf. *Startup v. Macdonald* (1843), 6 M. & Gr. at 624; *Allen v. Edmundson* (1848), 2 Exch. at 723.  
<sup>2</sup> *Id.*: *Parker v. Gordon* (1806), 7 East. 385; *Bank v. Carneal* (1829), 2 Pet. 543; Cf. *Whitaker v. Bank* (1835), 1 C. M. & R. 750, banker's duty to pay, see next Expl.

<sup>3</sup> *Morgan v. Davison* (1815), 1 Stark. 114; Cf. *Barclay v. Bailey* (1810), 2 Camp. 527 (8 p. m.). Have business hours changed since then?

<sup>4</sup> *Triggs v. Newnham* (1825), 10 Moore, 249; *Wilkins v. Jadis* (1831), 2 B. & Ad. 188; Cf. *Farnsworth v. Allen* (1855), 4 Gray (Mass.), 453 (9 p. m.).

<sup>5</sup> *Dana v. Sawyer* (1843), 22 Me. 244; Cf. *Lunt v. Adams* (1840), 17 Me. 230 (8 a. m.).

<sup>6</sup> *Skelton v. Dustin* (1879), 92 Ill. 49.

<sup>7</sup> *Henry v. Lee* (1814), 2 Chitty. 124; *Garnett v. Woodcock* (1817), 6 M. & S. 44; *Dana v. Sawyer*, *supra*.

<sup>8</sup> *Salt Spring Bank v. Burton* (1874), 58 N. Y. 430; *Bank v. Hollister*

By whom.

Art. 164. Presentment for payment must be made by the holder of a bill, or by some person authorized to receive the money on his behalf.<sup>1</sup> Cf. Art. 236.

*Exception.*—Presentment through the post-office may be sufficient.<sup>2</sup>

NOTE.—As to who must make the presentment preliminary to protest, see Art. 177, n.

*Duties of Agent.*—A collecting agent is, of course, liable to his principal if he does not use due diligence in presenting a bill for payment and take the proper proceedings on dishonor.<sup>3</sup> The same rule applies to a pledgee or person holding a bill as collateral security.<sup>4</sup> An agent is, as a rule, responsible for the default of a sub-agent whom he employs; and it is accordingly held that a bank receiving a bill for collection, whether payable at its counter or elsewhere, is liable for any default occurring in its collection, whether of the officers and immediate servants, or other agents of the bank or its correspondents, or agents employed by such correspondents, including the notary, at least in the absence of any usage or agreement to the contrary;<sup>5</sup> but other authorities holding this rule admit an exception when the sub-agent is a notary, on the ground that he is a public officer and the agent of the holder.<sup>6</sup> On the other hand, it is held by some courts, that the duty of the collecting bank

(1858), 17 N. Y. 46; *Shepherd v. Chamberlin* (1857), 8 Gray (Mass.), 225; *First Nat. Bank v. Owen* (1867), 23 Ia. 185; *Reed v. Wilson* (1879), 41 N. J. L. 29.

<sup>1</sup> *Leftley v. Mills* (1791), 4 T. R. at 175; *Walker v. Macdonald* (184<sup>o</sup>), 2 Exch. at 532; Cf. *Cole v. Jessop* (1854), 10 N. Y. at 100; *Shed v. Brett* (1823), 1 Pick. (Mass.) 401.

<sup>2</sup> *Heywood v. Pickering* (1874), 9 L. R. Q. B. 428 at 432; *Pier v. Heinrichshoffen* (1877), 67 Mo. 163; Cf. *Prideaux v. Criddle* (1869), 4 L. R. Q. B. at 461; *Windham Bank v. Norton* (1852), 22 Conn. 214; *Indig v. Nat. City Bank* (1880), 80 N. Y. 100. But see *Stuckert v. Anderson* (1837), 3 Whart. (Pa.) 116.

<sup>3</sup> Cf. *Lysaght v. Bryant* (1850), 19 L. J. C. P. at 160, Maule, J., and Art. 147, n.; *Mechanics' Bank v. Bank* (1843), 6 Met. (Mass.) 13.

<sup>4</sup> *Peacock v. Purcell* (1863), 32 L. J. C. P. 266; *Briggs v. Parsons* (1878), 39 Mich. 400; *Mauney v. Coit* (1879), 80 N. C. 300.

<sup>5</sup> *Ayrault v. Bank* (1872), 47 N. Y. 570 at 573; *Allen v. Merchants' Bank* (1839), 22 Wend. (N. Y.) 215; *Bank of Lindsborg v. Ober* (1884), 31 Kans. 599; *Davey v. Jones* (1880), 13 Vroom (N. J.), 28; *Bird v. Bank* (1876), 93 U. S. 96.

<sup>6</sup> *Britton v. Niccolls* (1881), 104 U. S. 757; *Bank v. Butler* (1885), 41 O. St. 519; *Baldwin v. Bank* (1846), 1 La. An. 13; *Bowling v. Arthur* (1857), 34 Miss. 41; Cf. *Stacy v. Bank* (1860), 12 Wis. 629. But cf. *Gerhardt v. Sav. Inst.* (1866), 38 Mo. 60, (bank liable for notary under bond to the bank).

is discharged by the exercise of due care in the selection of By whom.  
suitable sub-agents.<sup>1</sup>

Art. 165. The person who presents a bill for pay- Bill must be  
ment must produce it, and must be ready and willing produced.  
to deliver it up on receiving payment.<sup>2</sup>

NOTE.—If the bill be lost a copy should be presented—but  
qu. as to the sufficiency of this? A protest it seems can be  
made on a copy.<sup>3</sup> As to the parts of a set, see Arts. 27 and 29.

*Explanation.*—When the bill is not produced, but  
payment is refused on some other ground, the bill is  
deemed to have been duly presented.<sup>4</sup>

Art. 166. When a bill is made payable at a partic- At what place.  
ular place by the drawer in his draft, or by the ac-  
ceptor in a general acceptance (Cf. Art. 39 (3)), pre-  
sentment for payment must be made at that place.<sup>5</sup>

#### ILLUSTRATIONS.

1. A. draws a bill on B. in Liverpool, payable in London.  
B. accepts it, payable at the "X. Bank," London. Present-  
ment must be made at the "X. Bank." Presentment to B. in  
Liverpool is not sufficient to charge the drawer.<sup>6</sup>

2. A. draws a bill on B. residing in Boston. B. accepts it,  
payable at the "X. Bank" in Boston. This is a general ac-

<sup>1</sup> *Warren Bank v. Suffolk Bank* (1852), 10 Cush. (Mass.) 582; *Belle-  
mire v. Bank* (1838), 4 Whart. (Pa.) 105; *Daly v. Bank* (1874), 56 Mo.  
94; *Stacy v. Bank* (1860), 12 Wis. 629.

<sup>2</sup> Cf. *Hansard v. Robinson* (1827), 7 B. & C. at 94; *Griffin v. Weather-  
by* (1868), 3 L. R. Q. B. at 760; *Musson v. Lake* (1845), 4 How. (U. S.)  
262; *Arnold v. Dresser* (1864), 8 Allen (Mass.), 435; Art. 206.

<sup>3</sup> *Dehors v. Harriott* (1691), 1 Show. 163; *Pothier*, No. 145; *Brooks'  
Notary*, 4 ed. pp. 137, 217. Presentment by copy and tendering a bond  
of indemnity, valid, *Lane v. Bank* (1872), 9 Heisk. (Tenn.) 419.

<sup>4</sup> *Gilbert v. Dennis* (1842), 3 Met. (Mass.) 495; *King v. Crowell* (1873),  
61 Me. 244.

<sup>5</sup> *Gibb v. Mather* (1832), 2 Cr. & J. 254 at 262, Ex. Ch.; *Bank of U. S.  
v. Smith* (1826), 11 Wheat. (U. S.) 171; Cf. *Boydell v. Harkness* (1846),  
3 C. B. at 171; German Exchange Law, Art. 43. Contra, *Fuller v.  
Dingman* (1875), 41 Ia. 506.

<sup>6</sup> *Gibb v. Mather* (1832), 2 Cr. & J. 254, Ex. Ch.; *Shaw v. Reed* (1831),  
12 Pick. (Mass.) 132. Contra, *Mason v. Franklin* (1808), 3 Johns. (N.  
Y.) 202.

At what place. ceptance (Art. 39); but presentment at the "X. Bank" is necessary to charge the drawer and indorsers.<sup>1</sup>

3. C., the holder of a note payable on demand at the X. Bank, indorses it to D. D. writes to the maker requesting payment. This is not a sufficient demand to charge C. as indorser.<sup>2</sup>

*Explanation 1.*—When a bill is made payable at a bank in a town where there is a clearing-house, presentment through the clearing-house is (probably) a sufficient presentment at that bank.<sup>3</sup>

*Explanation 2.*—When a bill of exchange contains the address of the drawee, and no place of payment is specified, it is payable at such address.<sup>4</sup>

NOTE.—Presentment may be made at such address, but it does not seem to be decided that it *must* be made there. See next note. Dating a note at a certain place does not make it payable there, but it is only *prima facie* evidence of the place of payment.<sup>5</sup> And presentment for payment at place of date is insufficient, if the place of business or residence of the maker can be ascertained on due inquiry.<sup>6</sup>

To whom presentment must be made.

Art. 167. When a place of payment is designated by a bill, presentment for payment at that place is a sufficient presentment to the drawee or acceptor without any further demand.<sup>7</sup>

*Explanation 1.*—It is the duty of the payor to see that the money is ready at the place where the bill is

<sup>1</sup> *Troy Bank v. Lauman* (1859), 19 N. Y. 477; Cf. *Saul v. Jones* (1858), 28 L. J. Q. B. 37.

<sup>2</sup> *Parker v. Straud* (1885), 98 N. Y. 379.

<sup>3</sup> *Reynolds v. Chettle* (1811), 2 Camp. 595; *Harris v. Parker* (1833), 3 Tyr. 370.

<sup>4</sup> *Hine v. Allely* (1833), 1 N. & M. 433; *Buxton v. Jones* (1840), 1 M. & Gr. 83; *Cox v. Nat. Bank* (1879), 100 U. S. 704.

<sup>5</sup> *Blodgett v. Durgin* (1859), 32 Vt. 361; Cf. *Childs v. Laflin* (1870), 55 Ill. at 160.

<sup>6</sup> *Taylor v. Snyder* (1846), 3 Den. (N. Y.) 145; *Hartford Bank v. Green* (1861), 11 Ia. 476.

<sup>7</sup> *De Bergareche v. Pillin* (1826), 3 Bing. 476; *Wilmot v. Williams* (1844), 7 M. & Gr. 1017; *Lawrence v. Dobyns* (1860), 30 Mo. 196; Cf. *Butterworth v. Le Despencer* (1814), 3 M. & S. 149.

payable, and that there is some person there with authority to hand over the money in exchange for the bill.<sup>1</sup> To whom presentment must be made.

## ILLUSTRATIONS.

1. B. makes a note payable at his house in Maidstone and at the "X. Bank," London. Presentment at either place is sufficient.<sup>2</sup>

2. B. accepts a bill "payable at No. 1, X. Street, London." B. dies. Presentment at 1, X. Street, is sufficient, without making search for B.'s executor.<sup>3</sup>

3. Bill addressed to "Mr. B., No. 1, X. Street, London." B. accepts it generally. It is presented at No. 1, X. Street, and the house is found shut up. This is sufficient.<sup>4</sup>

4. Bill addressed to "Mr. B., No. 1, X. Street, London." B. accepts it generally. The holder takes the bill to No. 1, X. Street, and inquires for B. A woman living in the house informs him that B. has left. This is sufficient.<sup>5</sup>

5. B. accepts a bill payable at the "X. Bank." At maturity the "X. Bank" hold the bill, but B. has no assets there. This is sufficient. No presentment to B. personally is necessary.<sup>6</sup> But the mere physical presence of the bill in the bank without the knowledge of its officers, would be insufficient.<sup>7</sup>

6. B. makes a note "payable at Chicago." If B. has no place of business or residence in Chicago, the presence of the holder with the note on day of maturity anywhere in Chicago will constitute due presentment.<sup>8</sup>

<sup>1</sup> *Brown v. McDermott* (1805), 5 Esp. 265; *Buxton v. Jones* (1840), 1 M. & Gr. at 86.

<sup>2</sup> *Beeching v. Gower* (1816), Holt, N. P. C. 313; Cf. *Pollard v. Herries* (1803), 3 B. & P. 335; *Malden Bank v. Baldwin* (1859), 13 Gray (Mass.), 154; *Allen v. Avery* (1859), 47 Me. 287.

<sup>3</sup> *Philpot v. Bryant* (1827), 3 C. & P. 244.

<sup>4</sup> *Hine v. Allely* (1833), 4 B. & Ad. 624; *Struthers v. Kendall* (1861), 41 Pa. St. 214; Cf. *Cox v. Nat. Bank* (1879), 100 U. S. 704.

<sup>5</sup> *Burton v. Jones* (1840), 1 M. & Gr. 83.

<sup>6</sup> *Bailey v. Porter* (1845), 14 M. & W. 44; *North Bank v. Abbott* (1833), 13 Pick. (Mass.) 465; *Huffaker v. Bank* (1878), 13 Bush. (Ky.) 644.

<sup>7</sup> *Chicopee Bank v. Philadelphia Bank* (1869), 8 Wall. (U. S.) 641.

<sup>8</sup> *Meyer v. Hibsher* (1872), 47 N. Y. 265.



To whom presentment must be made.

*Explanation 2.*—When no place of payment is designated by a bill, presentment for payment should be made to the drawee or acceptor at his place of business or residence.<sup>1</sup>

*Explanation 3.*—When presentment for payment of a bill payable generally is made at an improper place, but payment is refused on some other ground, the bill is deemed to have been duly presented.

#### ILLUSTRATION.

C., the holder of a note specifying no place of payment, meets B., the maker, on the street on day of maturity, and presents it for payment. B. merely says he is unable to pay it, and raises no objection to the place of the demand. This is (probably) due presentment.<sup>2</sup>

NOTE.—The law on this point is not clearly settled, but the test question in all cases is this—Has due diligence been used in making the demand for payment? If the bill is payable generally, the place where the presentment is made to the acceptor himself is, within the limits of Expl. 3, immaterial. But when demand on the acceptor personally is not made, the question is, not where it *must* be made, but at what place presentment for payment is *sufficient*, and excuses the holder from further inquiry. Three rules may be laid down. (1.) If the acceptor has, at the time the bill matures,<sup>3</sup> an established place of business, presentment there at the proper hour is sufficient, though the place is found closed.<sup>4</sup> (2.) If the acceptor has no place of business, or it cannot be found on due inquiry, presentment at the *then residence* of the acceptor at a proper hour is sufficient, and no further search need be made.<sup>5</sup> (3.) But if the acceptor has removed into another state or country from that in which he resided at the execution of the bill, present-

<sup>1</sup> Cf. *Mitchell v. Baring* (1829), 10 B. & C. at 9; *Barnes v. Vaughan* (1859), 6 R. I. 259; *Shed v. Brett* (1823), 1 Pick. (Mass.) 413.

<sup>2</sup> Cf. *King v. Crowell* (1873), 61 Me. 244; *King v. Holmes*, (1849), 11 Pa. St. 456; Arts. 163, 165.

<sup>3</sup> *Granite Bank v. Ayers* (1835), 16 Pick. (Mass.) 392; *Talbot v. Commonwealth Bank* (1880), 129 Mass. 67.

<sup>4</sup> *West v. Brown* (1856), 6 O. St. 542; Cf. *Bank v. Mudgett* (1870), 44 N. Y. 514; *Sussex Bank v. Baldwin* (1840), 2 Harrison (N. J.), 487; *Wallace v. Crilley* (1879), 46 Wis. 577.

<sup>5</sup> *Bank v. Orvis* (1876), 42 Ia. 691; *Packard v. Lyon* (1855), 5 Duer (N. Y.), 82; *Brooks v. Blaney* (1873), 62 Me. 456; *Chard v. Fox* (1849), 14 Q. B. 230.

ment at his *former* residence or place of business will be sufficient.<sup>1</sup> By some authorities, presentment is dispensed with in such case.<sup>2</sup> If he has only removed to another locality in the same state or country, presentment must be made in accordance with rule (1) and (2).<sup>3</sup> German Exchange Law, Art. 91, provides that when a bill is not payable at a particular place it must be presented for payment at the office of the drawee if he have one, or if not at his residence. If his office and residence are unknown, inquiry is to be made of the police, and the fact that search has been made for him is to be recorded in the protest. The proposed New York Civil Code (Draft of 1888), § 2781, provides that a negotiable instrument must be presented to the principal debtor if he can be found at the place where presentment should be made; if not, it must be presented at his place of residence or business, to some other person having charge thereof or employed therein, if one can be found there. If the instrument does not specify a place of payment, it must be presented at the place of business or residence of the principal debtor, or wherever he may be found, at the option of the presentor.

To whom  
presentment  
must be made.

*Explanation 4.*—When a bill is addressed to, or accepted, by two or more persons, who are not partners, and no place of payment is designated, presentment for payment must be made to them all.<sup>4</sup>

*Explanation 5.*—When the drawee or acceptor of a bill is dead, and no place of payment is designated, presentment for payment must be made to his executors or administrators, if they can be found.<sup>5</sup>

Art. 168. Presentment for payment is dispensed with—

Excuses for  
non-present-  
ment.

<sup>1</sup> *M'Gruder v. Bank* (1824), 9 Wheat. (U. S.) 598; and *Taylor v. Snyder* (1846), 3 Den. (N. Y.) 145; *Grafton Bank v. Cox* (1859), 13 Gray (Mass.), 503; *Herrick v. Baldwin* (1871), 17 Minn. 209.

<sup>2</sup> *Foster v. Julien* (1861), 24 N. Y. 28; *Gist v. Lybrand* (1828), 3 O. 308. *Contra, Wheeler v. Field* (1843), 6 Met. (Mass.) 290.

<sup>3</sup> *Anderson v. Drake* (1817), 14 Johns. (N. Y.) 114; Cf. *Reid v. Morrison* (1841), 2 Watts & S. (Pa.) 401.

<sup>4</sup> *Union Bank v. Willis* (1844), 8 Met. (Mass.) 504; *Blake v. McMillen* (1871), 33 Ia. 150; Cf. *Gates v. Beecher* (1875), 60 N. Y. 518, as to ex-partners. *Contra, Harris v. Clark* (1840), 10 O. 5. See as to joint and several note, *Britt v. Lawson* (1878), 15 Hun, 123.

<sup>5</sup> *Gower v. Moore* (1845), 27 Me. 16; *Frayzer v. Dameron* (1878), 6 Mo. Ap. 153; Cf. *Caunt v. Thompson* (1849), 7 C. B. 400; *Byles*, p. 207; French Code, Art. 163. But see *Hale v. Burr* (1815), 17 Mass. 86; *Laudry v. Stansbury* (1830), 10 La. 484. holding demand excused if administrator exempt from suit at the time.

Excuses for  
non-present-  
ment.

- (1.) When the drawee is a fictitious person,<sup>1</sup> or (perhaps) a person not having capacity to contract.<sup>2</sup>
- (2.) As regards the drawer or an indorser, when such drawer or indorser is, as between the parties to the bill, the principal debtor, and has no reason to expect that the bill would be paid if presented to the drawee or acceptor.<sup>3</sup> Cf. Art. 200.

#### ILLUSTRATIONS.

1. A. draws a bill on B. payable to his own order, and indorses it. B. accepts it to accommodate A. C. also indorses it to accommodate A. A. discounts it with D. A. does not provide B. with any funds to pay it. Presentment is not necessary to charge A.,<sup>4</sup> but is necessary to charge C.<sup>5</sup>

2. A. draws a check on the "B. Bank," not having sufficient funds there to meet it, and having no reason to expect that it will be honored. Presentment is not necessary to charge A.<sup>6</sup>

NOTE.—As regards this excuse, presentment for payment and notice of dishonor are said, in *Terry v. Parker*,<sup>4</sup> to rest on the same grounds. As to French Law, see Art. 160, n.

- (3.) As regards the drawer or an indorser, when such drawer or indorser has received such an assignment of the property of the acceptor as will dispense with notice of dishonor: Art. 200, Cl. (5.)

<sup>1</sup> *Smith v. Bellamy* (1817), 2 Stark. 233; Cf. Art. 2.

<sup>2</sup> *Byles* (12th ed.), p. 187; *Chitty*, p. 202; *Parsons*, I. p. 444, *sed quæ Wyman v. Adams* (1853), 12 Cush. (Mass.) 210.

<sup>3</sup> Cf. *Turner v. Samson* (1876), 2 L. R. Q. B. D. 23, C. A.; *Pothier*, No. 157.

<sup>4</sup> *Terry v. Parker* (1837), 6 A. & E. 502; Cf. *Shriner v. Keller* (1855), 25 Pa. St. 61.

<sup>5</sup> *Saul v. Jones* (1858), 28 L. J. Q. B. 37; *French v. Bank* (1807), 4 Cranch (C. Ct.), 141.

<sup>6</sup> *Wirth v. Austin* (1875), 10 L. R. C. P. 689; Cf. *Shaffer v. Maddox* (1879), 9 Neb. 205; *Mobley v. Clark* (1853), 28 Barb. (N. Y.) 390; *Miser v. Trovinger* (1857), 7 O. St. 281.

- (4.) When no place of payment is designated and the acceptor absconds before maturity.<sup>1</sup>
- (5.) When, after the exercise of reasonable diligence, presentment cannot be effected. Cf. Art. 200.

Excuses for  
non-present-  
ment

*Explanation.*—The fact that the holder has reason to believe that the bill will, on presentation, be dishonored, does not dispense with the necessity for presentment.<sup>2</sup>

#### ILLUSTRATIONS.

1. Bill drawn on B. is accepted by an agent. At the time the bill matures B. is abroad. This is no excuse; presentment should be made to the agent.<sup>3</sup>
2. B. makes a note "payable at Guildford." B. has no residence there. The note is presented at two banks, and then treated as dishonored. This is sufficient.<sup>4</sup>
3. The B. Company makes a note payable at its office at the place of execution, and before the note matures, removes from the state. Presentment is excused.<sup>5</sup>
4. The drawer of a bill orders the drawee not to pay it. The holder hears of this. Presentment is not dispensed with.<sup>6</sup>
5. The acceptor of a bill informs the holder that he cannot, or will not, pay it when due. Presentment is not dispensed with.<sup>7</sup>
6. The acceptor of a bill becomes bankrupt before it ma-

<sup>1</sup> *Lehman v. Jones* (1841), 1 W. & S. (Pa.) 126; Cf. *Spies v. Gilmore* (1848), 1 N. Y. at 826. *Aliter*, if a specified place of payment, *Sand» v. Clarke* (1849), 19 L. J. C. P. 84. *Contra*, in any case, *Pierce v. Cate* (1853), 12 Cush. (Mass.) 190.

Cf. *Pothier*, Nos. 144-147; *Re East of Eng. Co.* (1868), 4 L. R. Ch. at 18.

<sup>2</sup> *Phillips v. Astling* (1809), 2 Taunt. 206.

<sup>3</sup> *Hardy v. Woodroffe* (1818), 2 Stark. 319.

<sup>4</sup> *Smith v. Poillon* (1882), 87 N. Y. 590; Cf. *Foster v. Julien* (1861), 24 N. Y. 28.

*Hill v. Heap* (1823), D. & R. N. P. C. 57; Cf. *Nicholson v. Gouthit* (1796), 2 H. Bl. 609. *Contra*, *Lilley v. Miller* (1820), 2 N. & McC. (S. C.) 257.

<sup>7</sup> *Baker v. Birch* (1811), 3 Camp. 107; *Ex parte Bignold* (1836), 1 Deac. 712. *Sed qu?*

Excuses for  
non-present-  
ment.

tures. Presentment is not excused; it should be made to the acceptor.<sup>1</sup>

(6.) By waiver, express or implied.<sup>2</sup>

*Explanation 1.*—Waiver of notice of dishonor does not of itself include a waiver of presentment for payment.<sup>3</sup>

*Explanation 2.*—A waiver of protest includes a waiver of presentment for payment.<sup>4</sup>

NOTE.—As to waivers in the bill or indorsement, see Art. 121. The rules on this point concerning what amounts to a waiver, time when it may be made, etc., apply equally to waivers of notice of dishonor, treated more fully, *post*, Art. 200 (7). German Exchange Law, Art. 42, provides that when the drawer or indorser inserts the term "protest waived," presentment for payment is not waived thereby, but it lies on such drawer or indorser to prove that the bill has not been duly presented.

Excuses for  
delay in pre-  
sentment.

Art. 169. Delay in making presentment for payment is excused when such delay is caused by circumstances beyond the control of the holder, and not imputable to his negligence.<sup>5</sup> Cf. Art. 201.

#### ILLUSTRATIONS.

1. The holder of a bill dies suddenly just before it matures. The circumstances may be such as to excuse delay.<sup>6</sup>

2. Bill drawn in England, payable in Leghorn. At the time

<sup>1</sup> *Esdaille v. Sowerby* (1809), 11 East, at 117; *Howe v. Bowes* (1813), 5 Taunt. 30 Ex. Ch.; *Barton v. Baker* (1815), 1 S. & R. (Pa.) 334; *Howard Bank v. Carson* (1878), 30 Md. 18; *Pothier*, No. 147.

<sup>2</sup> *Hopley v. Dufresne* (1812), 15 East, 275; *Rindge v. Kimball* (1878), 124 Mass. 209; *Pollard v. Bowen* (1877), 57 Ind. 322; *Knapp v. Runals* (1875), 37 Wis. 135; *Givens v. Bank* (1877), 85 Ill. 442; Cf. *Ex parte Bignold* (1836), 1 Deac. at 737.

<sup>3</sup> *Hill v. Heap* (1823), D. & R. N. P. C. 57; *Berkshire Bank v. Jones* (1810), 6 Mass. 524; *Voorhies v. Atlee* (1870), 29 Ia. 49; *Wilkins v. Dawes* (1862), 20 La. Ann. 538. *Contra*, *Coddington v. Daris* (1848), 1 N. Y. 186; *Matthey v. Gally* (1854), 4 Cal. 62; Cf. Art. 200.

<sup>4</sup> *Harvey v. Nelson* (1879), 31 La. An. 434; *Coddington v. Daris* (1848), 1 N. Y. 186; *Hood v. Hallenbeck* (1876), 7 Hun (N. Y.), at 364.

<sup>5</sup> *Windham Bank v. Norton* (1852), 22 Conn. 214; *Pothier*, No. 114; *Nouguier*, §§ 1107-1108; *Story*, § 327; Cf. *Rothschild v. Currie* (1841), 1 Q. B. at 47.

<sup>6</sup> *White v. Stoddard* (1858), 11 Gray (Mass.), 258; *Pothier*, No. 144.

the bill matures Leghorn is besieged. The holder is not in Leghorn. This excuses delay.<sup>1</sup> Excuses for delay in presentment.

3. Bill presented for payment by post. It is sent off in time to reach the drawee on the day of maturity, but by mistake of the post-office is delayed some days. The delay is excused.<sup>2</sup>

4. Bill drawn in England, payable in Paris. By a French moratory law, passed in consequence of war, the maturity of bills payable in Paris is postponed three months. The delay in making presentment is excused.<sup>3</sup>

*Explanation.*—When the cause of delay ceases to operate, presentment for payment must be made with reasonable diligence.<sup>4</sup> Cf. Art. 201.

NOTE.—The cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but surely when the question is one of reasonable diligence the distinction is an important one.<sup>5</sup>

Art. 170. A bill is said to be dishonored by non-payment—(a) when it is duly presented for payment, and payment is refused or cannot be obtained;<sup>6</sup> or (b), when presentment for payment is excused, and the bill is overdue and unpaid. Dishonor by non-payment.

Art. 171. Subject to Art. 184 the holder of a bill which is dishonored by non-payment acquires an immediate right of recourse against all antecedent parties, provided he take the necessary proceedings on dishonor.<sup>7</sup> Consequence of dishonor.

NOTE.—As to when the holder's right of *action* accrues against an indorser, see Art. 252, Expl. 2, note.

<sup>1</sup> *Patience v. Townley* (1805), 2 J. P. Smith, 223; *Dunbar v. Tyler* (1871), 44 Miss. 1.

<sup>2</sup> *Windham Bank v. Norton* (1852), 22 Conn. 214; *Pier v. Heinrichschoffen* (1877), 67 Mo. 163; S. C., 29 Am. R. 501; Cf. Art. 201.

<sup>3</sup> *Rouquette v. Overman* (1875), 10 L. R. Q. B. 525.

<sup>4</sup> *Dunbar v. Tyler* (1870), 44 Miss. 1; *Peters v. Hobbs* (1867), 25 Ark. 67.

<sup>5</sup> Cf. *Allen v. Edmundson* (1848), 2 Exch. at 724, notice of dishonor.

<sup>6</sup> Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Butterworth v. Despencer* (1814), 3 M. & S. 150.

<sup>7</sup> *Ex parte Molins* (1812), 1 Rose, 303; *Siggers v. Lewis* (1834), C. M. & R. 370.

*Presentment for Payment to Charge Acceptor or Maker.*

Presentment to  
charge ac-  
ceptor.

Art. 172. When a bill is payable generally (Art. 38) presentment for payment is not requisite in order to charge the acceptor.<sup>1</sup>

NOTE.—The reason is that at common law the debtor is bound to seek out his creditor to pay him.<sup>2</sup> The practical importance of the rule is that the acceptor cannot avail himself of any informality in the presentment. No one would be likely to bring an action without first applying for payment.

*Explanation 1.*—When a bill is payable at a particular place, no presentment is necessary to charge the acceptor.<sup>3</sup>

ILLUSTRATION.

B. makes a note payable at the "X. Bank." The holder can maintain suit against B. without first presenting the note for payment;<sup>4</sup> but if B. show that he was ready to pay on day of maturity at the place named, it is a defense against any claim for interest, damages or costs since maturity, certainly if the sum due is deposited in court;<sup>5</sup> and if damaged he is discharged *pro tanto*.<sup>6</sup>

NOTE.—The law is now uniform in America in holding demand at the place named not a condition precedent to the acceptor's or maker's liability,<sup>7</sup> but the contrary doctrine finally

<sup>1</sup> *Rowe v. Young* (1820), 2 Bligh. H. L. at 467-468, *Bayley, J.*

<sup>2</sup> *Cranley v. Hillary* (1812), 2 M. & S. 120; *Walton v. Mascall* (1844), 13 M. & W. at 458. *Parke, B.*

<sup>3</sup> *Wallace v. McConnell* (1839), 13 Pet. (U. S.) 136; *Yeaton v. Burney* (1871), 62 Ill. 62; *Hills v. Place* (1872), 48 N. Y. 520; *Howard v. Boorman* (1-63), 17 Wis. 459; *Malden Bank v. Baldwin* (1859), 13 Gray (Mass.), 154. The law in England as to *bills of exchange* by statute, 1 & 2 Geo. 4, c. 78; British Code, § 19 (2) (c). *Contra*, at common law, *Howe v. Young* (1820), 2 Brod. & B. 165.

<sup>4</sup> *Id. Contra*, in England, *Boves v. Howe* (1813), 5 Taunt. 30, Ex. Ch.; *Spindler v. Grellett* (1847), 1 Exch. 384; unless place of payment is mere memorandum at the foot of the note, *Price v. Mitchell* (1815), 4 Camp. 200; *Exon v. Russell* (1816), 4 M. & S. 507.

<sup>5</sup> *Mahan v. Waters* (1875), 60 Mo. 167; *Yeaton v. Burney, supra*.

<sup>6</sup> *Lazier v. Horan* (1830), 55 Iowa, 75.

<sup>7</sup> Except bank notes on demand, *Bank of N. C. v. Bank* (1851), 13 Ired. L. (N. C.) 75; *Dougherty v. Bank* (1853), 13 Ga. 288. *Contra, Huston*

prevailed in England, and gave rise to a statute bringing bills of exchange into conformity with the American doctrine, but leaving promissory notes still subject to the rules of the common law in England.<sup>1</sup>

*Explanation 2.*—The acceptor may, by the terms of a qualified acceptance (Art. 39), make presentment for payment a condition precedent to his liability.<sup>2</sup>

#### ILLUSTRATION.

B. accepts a bill payable at the "X. Bank only and not elsewhere." The holder must present it for payment at the X. Bank before he can sue B.<sup>3</sup>

*NOTE.*—Neither a bill or note can be drawn conditionally (Art. 10). Hence it would seem that any words which made a demand a condition to liability, would render the instrument invalid as a bill or note. If a note is payable "on demand," or "on presentation at the X. Bank," the holder may recover without proving demand.<sup>4</sup> But demand has been held necessary before suing the maker of a note running, "On demand, I promise to pay C. or order at sight,"<sup>5</sup> and where maker promised to pay "on demand five months after date at the X. Bank."<sup>6</sup>

*Explanation 3.*—When, by the terms of an acceptance, presentment is required, the acceptor, in the absence of express stipulation, is not discharged by the mere omission to present the bill for payment on the day it matures.<sup>7</sup>

*v. Bishop* (1829), 3 Wend. (N. Y.) 13; *Montgomery v. Elliott* (1844), 6 Ala. 701.

<sup>1</sup> British Code, § 87 (1); Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at 262, 263; *Emblin v. Dartnell* (1844), 12 M. & W. 840.

<sup>2</sup> *Rowe v. Young* (1820), 2 Bligh. 391, H. L., as modified by 1 & 2 Geo. 4, c. 78; reproduced in British Code, § 19, (2) (c).

<sup>3</sup> *Halstead v. Skelton* (1843), 5 Q. B. at 93, 94, Ex. Ch.

<sup>4</sup> *Norton v. Ellam* (1837), 2 M. & W. at 464; *Warner v. Iron Co.* (1878), 3 Woods (C. Ct.), 514; Cf. *Dodd v. Gill* (1862), 3 F. & F. 261; *New Hope Co. v. Perry* (1850), 11 Ill. 467.

<sup>5</sup> *Dizon v. Nuttal* (1834), 1 Cr. M. & R. 307.

<sup>6</sup> Cf. *Armistead v. Armistead* (1839), 10 Leigh (Va.), at 523; *Wallace v. McConnell* (1839), 13 Pet. (U. S.) at 147. *Contra, Gammon v. Everett* (1845), 25 Me. 66.

<sup>7</sup> *Smith v. Vertue* (1860), 80 L. J. C. P. 56 at 59; see per Keating, J., at 60, as to acceptance to pay at a particular place.



Presentment to  
charge ac-  
ceptor.

NOTE.—When a bill is accepted payable at a particular place and there only, the acceptor's position is analogous to that of the drawer of a check.<sup>1</sup> If, then, he could show that he was damnified by the holder's negligence in omitting to present, he would probably be discharged. Cf. Art. 258.

### *Presentment for Payment to Charge Stranger to Bill.*

Guarantor.

Art. 173. Presentment for payment is not a condition precedent to the liability of a person who has given a guarantee for the payment of a bill by the acceptor.<sup>2</sup>

NOTE.—The reason is that presentment is not necessary to charge the acceptor or maker (Art. 172). If the drawer were the party guaranteed presentment would be necessary. The necessity of presentment and the necessity of notice, to charge a guarantor, resting on the same ground, the conflict of authorities is noted, *post*, Art. 204, note.

Person liable  
on considera-  
tion.

Art. 174. A person who is not a party to a bill, but who is liable on the consideration for which it is given, is discharged by the holder's omission to present it for payment.<sup>3</sup>

*Explanation.*—The same diligence is not requisite in this case as is necessary to charge a party to the instrument. It is sufficient that the holder does what is reasonable to obtain payment.<sup>4</sup>

<sup>1</sup> *Bishop v. Chitty* (1742), 2 Stra. 1195; *Ramchurn v. Radakissen* (1854), 9 Moore P. C. at 70, Parke, B.

<sup>2</sup> *Walton v. Mascall* (1844), 13 M. & W. 452; *Carter v. White* (1883), 25 Ch. D. 666, C. A.; *Nouguier*, § 1192; Cf. *Hitchcock v. Humfrey* (1843), 5 M. & Gr. 559; *Gage v. Lewis* (1873), 68 Ill. 605; *Greene v. Thompson* (1871), 33 Ia. 293.

<sup>3</sup> *Anderton v. Beck* (1812), 16 East, 248; *Hopkins v. Ware* (1869), 4 L. R. Ex. 268; Cf. *Straker v. Graham* (1839), 4 M. & W. 721, presentment for acceptance.

<sup>4</sup> *Sands v. Clarke* (1849), 8 C. B. at 761, Maule, J.; *Smith v. N. S. Wales Bank* (1872), 8 Moore P. C. N. S. at 461-463, Mellish, L. J. See *e. g.*, *Robson v. Oliver* (1847), 10 Q. B. 704, at 717.

*Noting and Protest.*

Art. 175. "Noting" means a minute made by a notary public on a dishonored bill at the time of its dishonor. <sup>Noting defined.</sup>

NOTE.—The "noting" consists of the notary's initials, the date, and the amount of the noting charges, and sometimes a statement of the cause of dishonor—*e. g.*, "no effects," or "no advice," or "no account." The noting is usually made on a ticket attached to the bill.<sup>1</sup>

Art. 176. "Protest" means a formal notarial certificate attesting the dishonor of a bill. <sup>Protest defined.</sup>

NOTE.—*Form, etc.*—See the term "notarial act" defined, Art. 45, n. The protest should contain (1) An exact copy of the bill, or the bill itself annexed. (2) A statement of the parties for whom and against whom the bill is protested. (3) The date of protesting and the place where protest is made. (4) A statement that acceptance or payment was demanded by the notary; the terms of the answer, if any; or a statement that no answer was given, or that the drawee or acceptor could not be found. (5) A reservation of rights against the parties liable. (6) The subscription and seal of the notary making the protest.<sup>2</sup> A protest may be in duplicate or triplicate.<sup>3</sup>

Art. 177. The protest must be made by a notary public or other person authorized to act as such. <sup>By whom protest to be made.</sup>

NOTE.—When the services of a notary cannot be obtained at the place where a bill is dishonored, it is said that a protest may be made by any respectable inhabitant in the presence of two witnesses.<sup>4</sup> In England the preliminary presentment of the bill to the drawee or acceptor is usually made by the notary's clerk.<sup>5</sup> In America, a protest founded on such a present-

<sup>1</sup> *Brooks' Notary*, 4th ed. p. 80; and forms, p. 213.

<sup>2</sup> *Id.* p. 82; and for forms, see pp. 214-219; Cf. French Code, Art. 173; German Exchange Law, Art. 88.

<sup>3</sup> *Id.* p. 82; Cf. *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105.

<sup>4</sup> *Byles*, p. 262; Cf. German Exchange Law, Art. 87; French Code, Art. 173.

<sup>5</sup> Cf. *Burke v. McKay* (1844), 2 How. (U. S.) 66; *Byles*, p. 262; and Cf. 9 & 10 Will. 3 c. 17, § 1.

<sup>6</sup> *Brooks' Notary*, 4th ed. pp. 78 and 138, and *Thomson*, p. 310, as to Scotland.

By whom protest to be made. ment is invalid, unless authorized by statute or usage.<sup>1</sup> But the certificate of protest may be signed by a clerk if authorized.<sup>2</sup>

Time for protest.

Art. 178. A foreign bill of exchange should be noted for protest on the day that it is dishonored.<sup>3</sup>

*Explanation.*—When a bill has been duly noted, the formal protest may be extended at any time.<sup>4</sup>

*NOTE.*—In practice foreign bills are frequently not noted till the day after their dishonor.<sup>5</sup> And it is conceived that if the bill has been duly presented this is sufficient. By French Code, Art. 162, a bill is to be protested for non-payment on the day after it is due. By German Exchange Law, Art. 41, a dishonored bill may be protested for non-payment on the day it is due, and it must not be protested later than the second day after. See the laws of different nations on the point collected: *Nouguier*, § 1270.

Where protest to be made.

Art. 179. A bill must be protested at the place where it is dishonored.<sup>6</sup>

*NOTE.*—When a bill of exchange, drawn payable at a place other than the residence of the drawee, is dishonored by non-acceptance, by a statute in England which is perhaps only declaratory of the common law, protest for non-payment may be made at either the place of residence or the place of payment.<sup>7</sup>

Conflict of laws.

Art. 180. When laws conflict, the validity of a protest is determined by the law of the place where it is made.<sup>8</sup>

<sup>1</sup> *Commercial Bank v. Varnum* (1872), 49 N. Y. 269; *Cribbs v. Adams* (1859), 13 Gray (Mass.), 597; Art. 57.

<sup>2</sup> *Fulton v. Maccracken* (1862), 18 Md. 528.

<sup>3</sup> *Tassel v. Lewis* (1699), Ld. Raym. 743; Cf. *Leftley v. Mills* (1791) 4 T. R. at 174.

<sup>4</sup> *Geralopulo v. Wieler*, (1851), 20 L. J. C. P. 105; *Bailey v. Dozier* (1848), 6 How. (U. S.), 23; Cf. *Dennistoun v. Steycart* (1854), 17 How. (U. S.) at 607, after suit begun; *Leftley v. Mills*, *supra*.

<sup>5</sup> *Brooks' Notary*, 4th ed. p. 80.

<sup>6</sup> Cf. *Mitchell v. Baring* (1829), 10 B. & C. 4; French Code, Art. 173.

<sup>7</sup> 2 & 3 Will. 4 c. 98 (1832); *Daniel*, § 935.

<sup>8</sup> *Rothschild v. Currie* (1841), 1 Q. B. 43; *Rouquette v. Overman* (1875), 10 L. R. Q. B. 525; *Carter v. Burley* (1838), 9 N. H. 558; *Thomson*, p. 308; *Pothier*, No. 155; *Nouguier*, § 1270; Cf. Art. 202.

*Protest to Charge Drawer and Indorsers.*

Art. 181. When a foreign bill of exchange<sup>1</sup> is dishonored it must be duly protested for non-acceptance or non-payment, as the case may be, in order that the holder may preserve his right of recourse against the drawer and indorsers.<sup>2</sup>

Protest—when necessary.

*Explanation 1.*—When a bill of exchange is dishonored by non-acceptance, and the holder, without lawful excuse, omits to protest it, the drawer and indorsers are discharged as regards such holder, and all subsequent holders, with notice that the bill has been so dishonored; but the drawer and indorsers are not discharged as regards a subsequent holder for value who takes the bill before it is overdue, and without notice that it has been dishonored.<sup>3</sup>

*Explanation 2.*—When a bill of exchange has been dishonored by non-acceptance, and duly protested, there may be a subsequent protest for non-payment at maturity.<sup>4</sup>

NOTE.—*Qu.* if such subsequent protest is not necessary in some cases, at any rate for the purpose of recourse abroad? See, too, Art. 185. As before pointed out (Art. 157, n.) under the Continental Codes, no right of action arises on non-acceptance; the holder can demand security from the antecedent parties, but he is bound to re-present the bill at maturity. A foreign note need not be protested,<sup>5</sup> nor need an inland bill or note;<sup>6</sup> nor a “foreign” check.<sup>7</sup> Statutes, however, have been

<sup>1</sup> Art. 24, foreign bill defined.

<sup>2</sup> *Gale v. Walsh* (1793), 5 T. R. 239; *Ocean Bank v. Williams* (1869), 102 Mass. 141; Cf. *Whitehead v. Walker* (1842), 9 M. & W. 506; *Ex parte Louenthal* (1874), 9 L. R. Ch. at 593.

<sup>3</sup> Cf. *Dunn v. O’Keefe* (1816), 5 M. & S. 282, Ex. Ch.; and Art. 191.

<sup>4</sup> *Campbell v. French* (1795), 6 T. R. at 211–212, Ex. Ch.; Cf. *Whitehead v. Walker* (1842), 9 M. & W. at 516.

<sup>5</sup> *Bonar v. Mitchell* (1850), 5 Exch. 415 at 417; *Burke v. McKay* (1844), 2 How. (U. S.) 66.

<sup>6</sup> *Windle v. Andrews* (1819), 2 B. & Ald. 696; *Knott v. Venable* (1868), 42 Ala. 186; *Smith v. Curlee* (1871), 59 Ill. 221.

<sup>7</sup> *Pollard v. Bowen* (1877), 57 Ind. 232. But see *Daniel*, § 1600.

Protest—when necessary. passed in many states *allowing* a protest on such instruments, and giving to it the like effect as in case of foreign bills of exchange.

Excuses for non-protest and delay.

Art. 182. Protest is dispensed with by circumstances which would dispense with notice of dishonor in the case of an inland bill; and delay in protesting is excused by circumstances which would excuse delay in giving notice of dishonor.<sup>1</sup>

NOTE.—Protest is waived by a waiver of presentment for payment.<sup>2</sup> As to notice of dishonor, see Arts. 200, 201; and Cf. Arts. 168, 169 as to excuses for non-presentment for payment, or delay in presentment; see Art. 121 as to indorsements waiving protest, and Art. 165, n., as to protest of lost bill.

### *Protest for Better Security.*

Better security. Art. 183. When the acceptor of a bill of exchange becomes bankrupt before its maturity, it may be protested for better security.<sup>3</sup>

NOTE.—Under some of the foreign codes, when the acceptor fails, security can be demanded from the drawer and indorsers. See *e. g.*, German Exchange Law, Art. 29. In England this cannot be done, and the only effect there of such a protest is that there may be an acceptance *supra protest* (Art. 41). In France if the acceptor fails the bill may be at once treated as dishonored and protested for non-payment: French Code, Art. 163, and *Nouguier*, § 1277.

### *Presentment when there is a Reference in Need.*

Holder's duty to present.

Art. 184. When a bill of exchange is dishonored by non-acceptance or by non-payment, and the drawer of such bill has given a reference in case of need (Art.

<sup>1</sup> *Legge v. Thorpe* (1810), 12 East, 171; see *e. g.*, *Campbell v. Webster* (1845), 15 L. J. C. P. 4, and *Moyer's Appeal* (1878), 87 Pa. St. 129 (waiver); *Rothschild v. Currie* (1841), 1 Q. B. at 47 (delay).

<sup>2</sup> *Jaccard v. Anderson* (1865), 37 Mo. 91.

<sup>3</sup> *Ex parte Wackerbath* (1800), 5 Ves. Jr. 574; *Daniel*, § 530; *Chitty*, p. 237; *Brooks' Notary*, 4th ed. p. 88; for a form, see p. 219.

7), the holder must (perhaps) present the bill for acceptance or payment *supra protest* in order to preserve his right of recourse against the drawer and indorsers.<sup>1</sup>

Holder's duty to present.

When the reference in case of need is given by an indorser, presentment for acceptance or payment *supra protest* is (probably) optional.<sup>2</sup>

NOTE.—When a reference in need is given by the drawer, presentment in accordance therewith seems to be part of the original contract. It is like the case of a bill drawn payable at the house of some person other than the drawee. Again, in the case of a foreign bill, how is the question affected by the fact that presentment is obligatory according to the law of the place where the bill is drawn? By French Law, when a reference in need is given by the drawer, the holder is bound to present, but when the reference is given by an indorser it seems he has an option: *Nouguier*, § 249-250. By German Exchange Law, Art. 62, presentment is in both cases obligatory.

Art. 185. A bill of exchange must be duly presented for payment to the drawee or acceptor and noted or protested for non-payment before it is presented for payment to the acceptor *supra protest*<sup>3</sup> or referee in case of need.<sup>4</sup>

Duty to protest for non-payment.

NOTE.—As to protest, see Arts. 175 to 180. If the holder omit to protest he cannot sue the acceptor *supra protest*; on the other hand, if the case of need pays without a protest, he pays at his own risk.<sup>5</sup> As to acceptance *supra protest*, see Arts. 41-48.

Art. 187. When a bill of exchange is dishonored by the acceptor *supra protest* it must (probably) be

Dishonor by acceptor *supra protest*.

<sup>1</sup> *Pothier*, No. 137, and the language of 6 & 7 Will. 4, c. 58; Cf. Arts. 43 and 243; expressly required by proposed N. Y. Civil Code (draft of 1888), § 2833.

<sup>2</sup> Cf. *Leonard v. Wilson* (1834), 2 Cr. & M. 589 at 595, and *passim Ex parte Prunge* (1865), 1 L. R. Eq. at 5.

<sup>3</sup> *Hoare v. Cazenove* (1812), 16 East, 391; Cf. *Williams v. Germaine* (1827), 7 B. & C. at 475-477; *Baring v. Clark* (1837), 19 Pick. (Mass.) 220; German Exchange Law, Arts. 62 and 88.

<sup>4</sup> *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 510; Cf. German Exchange Law, Arts. 62 and 88.

<sup>5</sup> Art. 241.

Dishonor by  
acceptor *supra*  
protest.

again protested in order to charge the other parties liable thereon.<sup>1</sup>

### *Notice of Dishonor to Charge Drawer and Indorsers.*

Notice of dishonor means notification.

Art. 188. "Notice of dishonor" means notification of dishonor, *i. e.* formal notice.

*Explanation.*—The fact that the drawer or indorser of a bill knows that it has been dishonored does not dispense with the necessity for giving him notice of dishonor.<sup>2</sup>

NOTE.—*Pothier* (No. 147), speaking of protests, lays down a similar rule: "la raison est que les formalités établies par les lois pour donner à quelqu'un la connaissance de quelque fait, ne se suppléent point, et ne s'accomplissent pas par équipollence." As regards notes and inland bills, notice of dishonor is the English substitute for protest.<sup>3</sup> As regards foreign bills notice of dishonor is supplementary to protest. Under French Code, Arts. 165-166 (modified by law of May 3, 1862, cf. *Nouguier*, §§ 1086-1099) and German Exchange Law, Arts. 45-47, notice of protest must be given within certain definite limits of time. See *post*, Art. 195.

When necessary.

Art. 189. When a bill is dishonored,<sup>4</sup> due notice of dishonor, unless excused, is a condition precedent to the liability of the drawer or any indorser thereof.<sup>5</sup>

*Explanation.*—Due notice of dishonor means notice given in accordance with Arts. 192 to 199.

<sup>1</sup> *Chitty*, p. 242; *Nouguier*, §§ 1320-1321. No English decision; Cf. *Williams v. Germaine* (1827), 1 M. & Ry. 408; German Exchange Law, Arts. 62 and 89; *Brooks' Notary*, 4th ed. p. 108.

<sup>2</sup> *Burgh v. Legge* (1839), 5 M. & W. at 422, Alderson B.; *Carter v. Flower* (1847), 16 M. & W. at 749, Parke, B.

<sup>3</sup> *Miers v. Brown* (1843), 11 M. & W. 372; *East v. Smith* (1847), 16 L. J. Q. B. 292; *Juniata Bank v. Hale* (1827), 16 Serg. & R. (Pa.) 157; *Lane v. Bank* (1872), 9 Heisk. (Tenn.) 419; Cf. *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

<sup>4</sup> *Solarte v. Palmer* (1838), 7 Bing. at 533.

<sup>5</sup> Arts. 156 and 170.

<sup>6</sup> *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. at 642; *Rowe v. Tipper* (1853), 22 L. J. C. P. at 137, Maule, J.

## ILLUSTRATION.

When necessary.

Bill drawn by A. and indorsed by C. is dishonored. Due notice is given to C., but none is given to A. The holder can sue C., but he cannot sue A.;<sup>1</sup> nor has C. any remedy over against A.<sup>2</sup>

NOTE.—The holder's duty is fulfilled by giving notice to the parties he intends to look to. If they in turn give notice to other parties, he may take advantage of it; but their omission to do so cannot prejudice him.

Art. 190. Subject to Arts. 191 and 258, the omission, without lawful excuse, to give due notice of dishonor to the drawer or any indorser of a bill, discharges such drawer or indorser from his liability on the instrument, and also from any liability on the consideration for which it was given.<sup>3</sup>

Consequence of omission to give notice of dishonor.

NOTE.—The omission of the holder of a note payable in instalments, to give notice of the non-payment of an instalment discharges the indorser from liability for such instalment only.<sup>4</sup> Under French Code, Arts. 168-170, the omission to give due notice of protest discharges the indorsers, but the drawer is not discharged unless he can show that the drawee had sufficient effects in his hands when he dishonored the bill. Under German Exchange Law, Art. 45, the omission to give due notice of protest deprives the holder of his right to interest and damages, but he can still recover the amount of the bill, unless his omission has caused actual damage.

Art. 191. When a bill of exchange is dishonored by non-acceptance, and due notice of dishonor is not given to the drawer or an indorser thereof, such drawer or indorser is discharged as regards the holder at the time of dishonor, and all subsequent holders with notice thereof;<sup>5</sup> but such drawer or indorser is not discharged as regards a subsequent holder for

Bill dishonored by non-acceptance and subsequently negotiated.

<sup>1</sup>Cf. *Rickford v. Ridge* (1810), 2 Camp. at 538.

<sup>2</sup>*Miers v. Brown* (1843), 11 M. & W. 372.

<sup>3</sup>*Bridges v. Berry* (1810), 3 Taunt. 130; *Peacock v. Purcell* (1863), 14 C. B. N. S. 748; Cf. *Phoenix Ins. Co. v. Allen* (1863), 11 Mich. 501.

<sup>4</sup>*Fitchburg Ins. Co. v. Davis* (1876), 121 Mass. 121.

<sup>5</sup>*Roscoe v. Hardy* (1810), 12 East, 434; *Bartlett v. Benson* (1845), 14 M. & W. 733; Cf. *Smith v. Roach* (1846), 7 B. Mon. (Ky.) 17.



Bill dishonored, etc.

Notice of dishonor, by whom to be given.

value who takes the bill before it is overdue and without notice that it has been so dishonored.<sup>1</sup>

Art. 192. Notice of dishonor must be given (a) by or on behalf of the holder,<sup>2</sup> or (b) by or on behalf of an indorser who, at the time of giving it, is liable on the bill, and who has a right of recourse against the party to whom notice is given.<sup>3</sup>

#### ILLUSTRATIONS.

1. A bill indorsed by C. and held by D. is dishonored. X., who was at one time employed by the drawer to get the bill discounted, but is not in any way acting on D.'s behalf, informs C. that the bill has been dishonored. This is not sufficient; C. is discharged.<sup>4</sup>

2. C. is the first indorser of a dishonored bill held by D. D. gives notice to C. one day late. C., on the same day, gives notice to the drawer, thus, as it were, making up for the lost day. This notice is ineffectual; for C. having been discharged by the holder's delay, is a mere stranger.<sup>5</sup>

3. A bill indorsed by C. is held by D. D.'s attorney gives notice of dishonor to the drawer, but by mistake gives it in C.'s name instead of D.'s. The notice is sufficient, provided C. is liable to D., and has a right of recourse against the drawer.<sup>6</sup>

4. C., the indorser of a bill, holds it as agent for the indorsee. C. presents it for payment, and it is dishonored. Notice of dishonor given by C. in his own name is sufficient.<sup>7</sup>

<sup>1</sup> *Dunn v. O'Keefe* (1816), 5 M. & S. 282, Ex. Ch.; Cf. *Whitehead v. Walker* (1842), 9 M. & W. 506; see, too, Art. 133, n.

<sup>2</sup> *Cromer v. Platt* (1877), 37 Mich. 132. See e. g. *Firth v. Thrush* (1828), 8 B. & C. 387 (notice given by holder's attorney); *Viale v. Michael* (1874), 30 L. T. N. S. 463 (by notary's clerk); *Bank of Utica v. Smith* (1820), 18 Johns. (N. Y.) 230 (by notary); *Bank v. Vaughan* (1865), 36 Mo. 90 (by cashier of collecting bank); *Martin v. Ingersoll* (1829), 8 Pick. (Mass.) at 6 (by acceptor *supra protest*); *Cowperthwaite v. Sheffield* (1848), 1 Sandf. (N. Y.) 416 (by pledgee of note).

<sup>3</sup> *Chapman v. Keane* (1835), 3 A. & E. 193; *Chanoine v. Fowler* (1829), 3 Wend. (N. Y.) 173; *Story*, § 304; Cf. *Burgh v. Legge* (1839), 5 M. & W. at 420, and *Harrison v. Ruscoe* (1846), 15 M. & W. at 234, 236. Parke, B.

<sup>4</sup> *Stewart v. Kennett* (1809), 2 Camp. 177; Cf. *East v. Smith* (1847), 16 L. J. Q. B. 292.

<sup>5</sup> *Turner v. Leach* (1821), 4 B. & Ald. 451.

<sup>6</sup> *Harrison v. Ruscoe* (1846), 15 M. & W. 231.

<sup>7</sup> *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160

*Explanation 1.*—A party entitled to give notice may constitute the drawee or acceptor his agent for the purpose of giving notice of dishonor.<sup>1</sup>

Notice of dishonor, by whom to be given.

*Explanation 2.*—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice whether that party be his principal or not.<sup>2</sup>

*Explanation 3.*—If the holder be dead, notice of dishonor may be given by his personal representative.<sup>3</sup>

Art. 193. Notice of dishonor may be given by the party entitled to give it either personally, or by messenger or other agent,<sup>4</sup> or through the post-office.<sup>5</sup>

In what manner.

*Explanation 1.*—Subject to Explanation 2, the sender of the notice is bound to show that it was actually received by the proper party (Art. 198) in due season, and if so received, the manner in which the notice was given is immaterial.<sup>6</sup>

*Explanation 2.*—When the person giving notice, and the party to whom notice is to be given, reside at the time of dishonor in different post-office deliveries, or in the same place, but where the carrier system prevails, due notice of dishonor is deemed to have

<sup>1</sup> *Rosher v. Kieran* (1814), 4 Camp. 86, as explained by *Harrison v. Ruscoe*, (1846), 15 M. & W. 231; Cf. *Glasgow v. Prattle* (1843), 8 Mo. 336 at 337; *First Nat. Bank v. Ryerson* (1867), 23 Ia. 508; *Bailey v. Bodenham* (1864), 33 L. J. C. P. at 255, Erle, J.; see *Stanton v. Blossom* (1817), 14 Mass. 116, where drawee had no authority, and notice was held bad. Cf. Art. 196

<sup>2</sup> *Harrison v. Ruscoe*, *supra*.

<sup>3</sup> *White v. Stoddard* (1858), 11 Gray (Mass.), 258; Cf. Art. 198, Expl. 3.

<sup>4</sup> Cf. *Bank v. Lawrence* (1828), 1 Pet. (U. S.) 578; *Pearson v. Crallan* (1805), 2 J. P. Smith. 404, as to messenger's expenses.

<sup>5</sup> *Stocken v. Collin* (1841), 7 M. & W. 515; Cf. Art. 201.

<sup>6</sup> Cf. *Cabot Bank v. Warner* (1865), 10 Allen (Mass.), at 524; *First Nat. Bank v. Wood* (1879), 51 Vt. 471; *Van Vechten v. Pruyn* (1856), 13 N. Y. at 555.

In what manner.

been given though by the delay or default of the post-office, never received, if the holder prove that a letter containing the notice was duly addressed and posted.<sup>1</sup>

#### ILLUSTRATIONS.

Due notice is deemed to have been given, if the letter is duly addressed, in the following cases:

1. C., first indorser, D., second indorser, and E., holder. E. residing in Xville, where bill is payable, deposits notice in Xville P. O. addressed to D., residing in Yville.<sup>2</sup>

2. D. and E. reside in Xville, but the bill is *payable* in Yville. E. delivers notice addressed to D. to the letter carrier on his route at Yville.<sup>3</sup>

3. D. and E. reside in Xville. D. is accustomed to receive his mail at one P. O. in Xville and E. at another, and there is a regular mail between the two offices. E. deposits notice in one office addressed to D. at the other.<sup>4</sup>

4. C. and D. reside in Xville, and E. in Yville, where bill is payable. E. mails at Yville a letter to D. enclosing notices of dishonor to him and to C. D., upon receipt of the letter, deposits the notice to C. in the P. O. at Xville.<sup>5</sup>

5. D. and E. reside in Xville, where the carrier system is established. E. deposits notice addressed to D. in a street post-office box.<sup>6</sup>

Otherwise unless actually received in the following cases:

6. E. resides in Xville, and D. in Yville, where the note is

<sup>1</sup> *Cabot Bank v. Warner* (1865), 10 Allen (Mass.) 522; *Forbes v. Omaha Nat. Bank* (1880), 10 Neb. 338. See *Woodcock v. Houldsworth* (1846), 16 M. & W. 124. (delay); *Mackay v. Judkins* (1858), 1 F. & F. 208, (loss), Byles, J.; *Remrick v. Tighe* (1860), 8 W. R. 391. As to address, *Hauckes v. Salter* (1828), 4 Bing. 715; Cf. *Skilbeck v. Garbett* (1845), 7 Q. B. 846.  
<sup>2</sup> *Munn v. Baldwin* (1810), 6 Mass. 316; *Shed v. Brett* (1823), 1 Pick. (Mass.) 401.

<sup>3</sup> *Wunen v. Schappert* (1878), 6 Daly (N. Y.) 558; Cf. *Price v. McGoldrick* (1876), 2 Abb. N. C. (N. Y.) 69.

<sup>4</sup> *Shaylor v. Mix* (1862), 4 Allen (Mass.) 351.

<sup>5</sup> *Eagle Bank v. Hathaway* (1842), 5 Met. (Mass.) 212; *Van Brunt v. Vaughan* (1877), 47 Ia. 145; Cf. Art. 195, Expl. 5, and Art. 198, n.

<sup>6</sup> *Shoemaker v. Bank* (1868), 59 Pa. St. 79; *Walters v. Brown* (1859), 15 Md. 285, and *Greenwich Bank v. DeGroot* (1876), 7 Hun (N. Y.), 210; *Mechanics' Bank v. Crow* (1874), 5 Daly (N. Y.), 191.

payable. E. upon making due demand at Yville, deposits notice addressed to D., in the P. O. at Yville.<sup>1</sup> In what manner.

7. E. resides in Xville. D. also resides in Xville, and receives his mail at the Xville P. O., but his residence is outside of the corporate limits, and some ten miles from the office. E. deposits notice addressed to D. in the P. O. at Xville.<sup>2</sup>

NOTE.—The mail may always be used with this effect in England, as the carrier system everywhere prevails.<sup>3</sup> The sufficiency of the direction on the letter is a question of reasonable diligence. If the drawer or indorser has a place of business the notice should be addressed to him there; if he has not, then it should be addressed to him at his residence, and the party giving notice is bound to use reasonable diligence to discover such place of business or residence.<sup>4</sup> Notice sent to the address given by an indorser is sufficient to charge him,<sup>5</sup> and in England it is held that the drawer will be charged in any case by notice sent to the place of date of the bill.<sup>6</sup> But in America the sender is nevertheless bound to use due diligence in ascertaining the drawer's true residence at the time of dishonor.<sup>7</sup> The sender may, however, *presume* that the drawer or indorser's residence at the time of drawing or indorsing remains unchanged.<sup>8</sup> German Exchange Law, Art. 47, provides that when an indorser does not state his address, notice may be sent to the indorser who precedes him.

#### Art. 194. Notice of dishonor given by or on be- For whose benefit notice entered.

<sup>1</sup> *Bowling v. Harrison* (1847), 6 How. (U. S.) 248; Cf. *Peirce v. Pen-dar* (1842), 5 Met. (Mass.) 352. *Contra, Philipe v. Haberee* (1872), 45 Ala. 597; Cf. *Tomeny v. Bank* (1872), 9 Heisk. (Tenn.) 493.

<sup>2</sup> *Forbes v. Omaha Nat. Bank* (1880), 10 Neb. 338; Cf. *Shelburne Bank v. Townsley* (1869), 102 Mass. at 182. *Contra, Barret v. Evans* (1859), 28 Mo. 331; *Bank v. Lawrence* (1828), 1 Pet. (U. S.) 578; *Timms v. Delisle* (1840), 5 Blackf. (Ind.) 447; Cf. *Gist v. Lybrand* (1828), 3 O. 308.

<sup>3</sup> *Bigelow*, p. 309; British Code, § 49 (15).

<sup>4</sup> *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. 639; *Bank v. Bender* (1839), 21 Wend. (N. Y.) 643; *Herbert v. Serrin* (1879), 41 N. J. L. 225. See *a. g.*, *Roberts v. Taft* (1876), 120 Mass. 169; *Burlingame v. Foster* (1880), 128 Mass. 125; *Central Bank v. Lerin* (1879), 6 Mo. Ap. 543; *Greenwich Bank v. DeGroot* (1876), 7 Hun (N. Y.), 210.

<sup>5</sup> *Eastern Bank v. Brown* (1840), 17 Me. 356; *Bartlett v. Robinson* (1868), 39 N. Y. 187.

<sup>6</sup> *Burmester v. Barron* (1852), 17 Q. B. 828; Cf. *Ex parte Baker* (1877), 4 L. R. Ch. D. at 799, C. A.

<sup>7</sup> *Lowery v. Scott* (1840), 24 Wend. (N. Y.), 358; *Pierce v. Strathers* (1856), 27 Pa. St. 249; *Mason v. Pritchard* (1872), 9 Heisk. (Tenn.) 793.

<sup>8</sup> *Requa v. Collins* (1872), 51 N. Y. 148; *Knott v. Venable* (1868), 42 Ala. 186.

For whose benefit notice enures.

half of the holder enures for the benefit of (a) all subsequent holders, and (b) all prior indorsers liable on the bill who have a right of recourse against the party to whom notice is given.<sup>1</sup>

Notice of dishonor given by or on behalf of an indorser entitled to give notice,<sup>2</sup> enures for the benefit of the holder and all indorsers liable on the bill who have a right of recourse against the party to whom notice is given.<sup>3</sup>

NOTE.—In New York it has been held that notice duly sent by the holder does not enure for the benefit of a prior indorser, unless it reaches the party to whom it is sent, but the circumstances of the case were somewhat special.<sup>4</sup> See Art. 191 for a case where an indorser might be liable on the bill, and yet not able to avail himself of a notice of dishonor given by another, or to give one himself.

Notice of dishonor, when to be given.

Art. 195. Notice of dishonor may be given by or on behalf of the holder as soon as the bill has been dishonored,<sup>5</sup> and it must be given within a reasonable time after dishonor.<sup>6</sup>

*Explanation 1.*—Reasonable time is a mixed question of law and fact.<sup>7</sup>

*Explanation 2.*—In determining what is a reasonable time, non-business days must be excluded.<sup>8</sup>

<sup>1</sup> *Byles*, p. 290, 291; *Stafford v. Yates* (1820), 18 Johns. (N. Y.) 327; *Williams v. Matthews* (1824), 3 Cow. (N. Y.) 252.

<sup>2</sup> Cf. Art. 192.

<sup>3</sup> *Chapman v. Keane* (1835), 3 A. & E. 193; *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160; *Streeter v. Fort Bank* (1866), 54 N. Y. 413.

<sup>4</sup> *Beale v. Parish* (1859), 20 N. Y. 407.

<sup>5</sup> *Burbridge v. Manners* (1812), 3 Camp. 193; *Ex parte Moline* (1812), 1 Rose, 303; *Farmers' Bank v. Durall* (1835), 7 G. & J. (Md.) 78; *King v. Crowell* (1873), 61 Me. 244; *Jackson v. Richards* (1805), 2 Caines (N. Y.) 343; Cf. Art. 171.

<sup>6</sup> *Hirschfeld v. Smith* (1866), 1 L. R. C. P. at 351; *Gladwell v. Turner* (1870), 5 L. R. Ex. at 61.

<sup>7</sup> *Id.*; Cf. *Bank v. Swann* (1835), 9 Pet. (U. S.) at 46; *Wyman v. Adams* (1852), 12 Cush. (Mass.) at 213, 214; Arts. 150, 162.

<sup>8</sup> *Eagle Bank v. Chapin* (1825), 3 Pick. (Mass.) 180; Cf. *Farmers' Bank v. Vail* (1860), 21 N. Y. 485; *Hallowell v. Curry* (1861), 41 Pa. St. 322; *Lindo v. Unsworth* (1811), 2 Camp. 601, Jewish sacred festival.

*Explanation 3.*—When the person giving notice and the party to whom notice is to be given live in the same place, the notice must, in the absence of special circumstances, be *received* by such party at a reasonable hour<sup>1</sup> on the day after the sender became entitled to give notice.<sup>2</sup>

Notice of dishonor, when to be given.

*Exception.*—In such cases within Art. 193, Expl. 2, the notice must be *sent off* in time by due course of mail to reach the party to be notified on the day after the sender became entitled to give notice.<sup>3</sup>

*Explanation 4.*—Subject to the foregoing exception, if the case is within Art. 193, Expl. 2, and notice is given through the post-office, the notice must, in the absence of special circumstances, be *sent off* on the day after the dishonor of the bill, if there be a post at a reasonable hour on that day;<sup>4</sup> and if there be no such post on that day, then by the next post thereafter.<sup>5</sup>

*Explanation 5.*—If the case is within Art. 193, Expl. 2, and notice is not given through the post-office, the notice must, in the absence of special circumstances, be *received* at a reasonable hour on the same day it would have been received by due course of mail.<sup>6</sup>

<sup>1</sup> *John v. Bank* (1876), 57 Ala. 96; *Adams v. Wright* (1861), 14 Wis. 408; *Jameson v. Swinton* (1810), 2 Taunt. 224; Cf. *Cabot Bank v. Warner* (1865), 10 Allen (Mass.), at 524.

<sup>2</sup> Cf. *Gladwell v. Turner* (1870), 5 L. R. Ex. at 61, Martin. B.

<sup>3</sup> *Smith v. Mullet* (1809), 2 Camp. 208; *Hilton v. Fairclough* (1811), 2 Camp. 601; Cf. *Walters v. Brown* (1859), 15 Md. at 292.

<sup>4</sup> *Williams v. Smith* (1819), 2 B. & Ald. at 500; *Lawson v. Bank* (1853), 1 O. St. 206. See, e. g., *Stephenson v. Dickson* (1854), 24 Pa. St. 148; *Haskell v. Boardman* (1864), 8 Allen (Mass.), 38; *West v. Brown* (1856), 6 O. St. 542; *Burgess v. Vreelund* (1853), 4 Zab. (N. J.) 71.

<sup>5</sup> *Hawken v. Salter* (1828), 4 Bing. 715; *Lawson v. Bank* (1853), 1 O. St. 206; *Carter v. Burley* (1838), 9 N. H. 558, at 570; Cf. *Geill v. Jeremy* (1827), M. & M. 61.

<sup>6</sup> *Bancroft v. Hall* (1816) 1 Holt, 476; *Darbishire v. Parker* (1805),

Notice of dishonor, when to be given.

NOTE.—Under French Code, Art. 165, the holder of a dishonored bill must give notice of protest and commence proceedings within fifteen days of the date of protest, if the drawer or indorser sought to be charged live within five myriamètres. Extra time is given for extra distance. Thus, under Art. 166, as modified by the law of May 3, 1862, when a bill is payable in England the holder has one month for giving notice of protest and commencing proceedings against a French drawer or indorser. The notice of protest and the summons (*assignation en justice*) are usually comprised in one document, *Nouquier*, §§ 1088–1089. Under German Exchange Law, Art. 45, the holder must send off written notice of protest within two days after protest.

Right of party receiving notice to transfer it within reasonable time.

Art. 196. A party who receives due notice of the dishonor of a bill has, after the receipt of such notice, the same time for giving notice to antecedent parties that the original holder has after the dishonor of the bill.<sup>1</sup> Cf. Art. 195.

#### ILLUSTRATION.

C., the indorser of a bill held by D., receives notice of dishonor on Sunday morning. Sunday being a *dies non*, it is sufficient if C. send off notice to the drawer on Tuesday.<sup>2</sup>

*Explanation 1.*—When a bill is in the hands of an agent, the agent has the same time for giving notice to his principal that he would have if he were an independent holder and his principal an indorser liable to him.<sup>3</sup>

#### ILLUSTRATIONS.

1. A bill payable in London is indorsed in blank by the

6 East, 8; Cf. *Jarvis v. St. Croix Co.* (1843), 23 Me. 287; *First Nat. Bank v. Wood* (1879), 51 Vt. 471; *Shelburne Bank v. Townsley* (1869), 102 Mass. at 183.

<sup>1</sup> *Bray v. Hadwen* (1816), 5 M. & S. 68; *Lawson v. Bank* (1853), 1 O. St. 206; *Manchester Bank v. Fellows* (1854), 8 Fost. (N. H.) 302; Cf. *Rowe v. Tipper* (1853), 22 L. J. C. P. at 137; German Exchange Law, Art. 45; French Code, Arts. 167, 169. But see *Freeman's Bank v. Perkins* (1841), 18 Me. 292.

<sup>2</sup> *Wright v. Shawcross* (1819), cited 2 B. & Ald. at 501; *Deblienz v. Bullard* (1841), 1 Rob. (La.) 66.

<sup>3</sup> *Lawson v. Bank* (1853), 1 O. St. 206; *Howard v. Ires* (1841), 1 Hill (N. Y.), 263; *First Nat. Bank v. Smith* (1832), 132 Mass. 227.

holder, and deposited with a country banker for collection. The country banker's London agent presents it for payment and gives him due notice of its dishonor. The country banker the day after the receipt of such notice gives notice to his customer, who in turn gives similar notice to his indorser. This indorser has received due notice.<sup>1</sup>

2. C. indorses a bill to the Liverpool branch of the D. Bank. The Liverpool branch sends it to the Manchester branch, and the Manchester branch indorses it to the head office in London, who presents it for payment. The head office sends notice of dishonor to the Manchester branch, the Manchester branch sends notice to the Liverpool branch, who gives notice to C. Each branch, as regards time, is to be considered a distinct party.<sup>2</sup>

3. X. pays a bill *supra protest* for the honor of C., an indorser, who resides at Bruges, and the same day posts the bill to C. C. by return of post sends the bill back to X., who at once gives notice of dishonor to the drawer. Although six days have elapsed since the dishonor, the notice is in time, and X. can sue the drawer.<sup>3</sup>

NOTE.—See contra, *Ex parte Prange* (1865),<sup>4</sup> where the authorities were not cited.

*Explanation 2.*—When a bill is presented for payment through the post-office, the drawee or acceptor is deemed to be the agent of the holder for the purpose of giving notice of dishonor,<sup>5</sup> and has the same time for giving notice that the holder would have if he himself presented it.<sup>6</sup>

<sup>1</sup> *Bray v. Hadwen* (1816), 5 M. & S. 69; Cf. *Firth v. Thrush* (1828), 8 B. & C. 387.

<sup>2</sup> *Clode v. Bayley* (1843), 12 M. & W. 51, approved *Prince v. Oriental Bank* (1878), 3 L. R. Ap. Cas. at 322, P. C.; Cf. *Wynen v. Schappert* (1878), 6 Dury (N. Y.), 258.

<sup>3</sup> *Goodall v. Polhill* (1845), 14 L. J. C. P. 146.

<sup>4</sup> 1 L. R. Eq. 1.

<sup>5</sup> Cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. at 255, Erle, J.; *Windham Bank v. Norton* (1852), 22 Conn. 213.

<sup>6</sup> *Prideaux v. Criddle* (1869), 4 L. R. Q. B. at 461; Cf. *Heywood v. Pickering* (1874), 9 L. R. Q. B. 428; Cf. Art. 192, Expl. 1.



Notice of dishonor to remote parties.

Art. 197. The holder or other person entitled to give notice of dishonor must give notice to a remote party within the same limits of time that would suffice in the case of an immediate party.<sup>1</sup>

#### ILLUSTRATION.

A dishonored bill drawn by A. is held by H., the tenth indorsee. H. has no longer time to give notice to A. than he has to give notice to his immediate indorser—*e. g.*, if A., the drawer, and H. live in the same town, H. must give notice to A. on the day following the dishonor of the bill.

NOTE.—If the holder does not give notice to a remote party in due time, he cannot rely on his own notice; but if he has given due notice to his immediate indorser, his rights may yet be saved by a notice given by such indorser; Cf. Art. 194.

Notice of dishonor, to whom to be given.

Art. 198. Notice of dishonor must be given to the drawer or indorser intended to be charged, or to some person authorized to receive notice on his behalf.

NOTE.—But it has been held in Massachusetts, in evident conflict with this principle, that it is sufficient to charge a prior indorser, if notice for him is enclosed to a subsequent indorser, though never received by the latter, and therefore not forwarded to the prior indorser.

*Explanation 1.*—It is the duty of a drawer or indorser, if he be absent from his place of business or residence, to see that there is some person there to receive notice on his behalf.<sup>2</sup>

#### ILLUSTRATIONS.

1. C. is the indorser of a bill which is dishonored. Verbal notice given to his solicitor is not sufficient.<sup>4</sup>

<sup>1</sup> *Rowe v. Tipper* (1853), 22 L. J. C. P. 135; *Simpson v. Turney* (1844), 5 Hump. (Tenn.) 419; Cf. *Nouquier*, § 1096.

<sup>2</sup> *Wamesit Bank v. Buttrick* (1858), 11 Gray (Mass.) 387. *Contra*, *Stiz v. Matthews* (1876), 63 Mo. 371.

<sup>3</sup> Cf. *Allen v. Edmundson* (1848), 2 Exch. at 723; *Turner v. Leach* (1818), cited *Chitty*, 10 ed. p. 333; *Howe v. Bradley* (1841), 19 Me. 35. Art. 200, Cl. (6).

<sup>4</sup> *Crosse v. Smith* (1813), 2 M. & S. at 553; *Louisiana Bank v. Ellery* (1825), 4 Mart. (La.) N. S. 87; Cf. *New York Bank v. Selma Bank* (1874), 51 Ala. 305.

2. X., who has authority to indorse for C., indorses a bill in C.'s name. Notice of dishonor given to X. is not sufficient.<sup>1</sup>

Notice of dishonor, to whom to be given.

3. The drawer of a bill is a non-trader. Verbal notice of dishonor given to his wife at his house, in his absence, is sufficient.<sup>2</sup>

4. The indorser of a bill is a merchant. Notice of dishonor, verbal or written, given to or left with a clerk at his counting-house, is sufficient.<sup>3</sup>

5. C. indorses a bill "in need at Messrs. X. & Co." Notice of dishonor given to X. & Co. is not sufficient to charge C.<sup>4</sup>

*Explanation 2.*—When the drawer or indorser of a bill becomes bankrupt, notice of dishonor may (probably) be given either to the bankrupt or to his assignee.<sup>5</sup>

NOTE.—It has been held that notice given to the bankrupt in ignorance that the assignee had been appointed is sufficient;<sup>6</sup> and that if the holder knows of an assignment by the indorser under state insolvent laws, it is sufficient to give notice to the assignee.<sup>7</sup> It is a question of reasonable diligence.

*Explanation 3.*—If the drawer or indorser of a bill be dead, and the party giving notice knows it, notice of dishonor must be given to one of his personal representatives, if such there be, and with the exercise of reasonable diligence, they can be discovered.<sup>8</sup>

NOTE.—If there be no executor or administrator, notice left

<sup>1</sup> *Valk v. Gaillard* (1849), 4 Strob. (S. C. L.) 99. But Cf. *Wilcox v. Rouh* (1848), 9 Sm. & M. (Miss.) 476; *Firth v. Thrush* (1828) 8 B. & C. at 391.

<sup>2</sup> *Housego v. Cowne* (1837), 2 M. & W. 348; Cf. *Wharton v. Wright* (1844), 1 C. & K. 585; *Blakeley v. Grant* (1810), 6 Mass. at 308.

<sup>3</sup> *Allen v. Edmundson* (1848), 2 Exch. at 724; *Viale v. Michael* (1874), 20 L. T. N. S. 463; *Edson v. Jacobs* (1839), 14 La. 494.

<sup>4</sup> *Ex parte Prange* (1865), 1 L. R. Eq. at 5.

<sup>5</sup> *Ex parte Baker* (1877), 4 L. R. Ch. D. 795; Cf. *Rhode v. Proctor* (1828), 4 B. & C. 517.

<sup>6</sup> *Ex parte Johnson* (1834), 1 Mon. & Ayr., at 628; Cf. *Donnell v. Lewis Co. Sav. Bank* (1883), 80 Mo. 165.

<sup>7</sup> *Callahan v. Bank of Ky.* (1884), 82 Ky. 231; *Contra, House v. Vinson Nat. Bank* (1885), 43 O. St. 346.

<sup>8</sup> *Byles*, p. 294; *Muss. Bank v. Oliver* (1852), 10 Cush. (Mass.) 557; *Cayuga Bank v. Bennett* (1843), 5 Hill (N. Y.), 236; *Beals v. Peck* (1851), 12 Barb. (N. Y.), 245.

Notice of dishonor, to whom to be given.

at the last residence of the drawer or indorser is sufficient;<sup>1</sup> and it has further been held that notice may be given to the person named as executor in the will of the deceased, but not yet legally appointed.<sup>2</sup>

*Explanation 4.*—When there are two or more joint drawers or indorsers who are not partners, notice of dishonor must be given to them all,<sup>3</sup> to bind either.<sup>4</sup>

Notice of dishonor, requires in form,

Art. 199. Notice of dishonor may be given (a) in writing, or (b) by personal communication. The notice may be given in any terms<sup>5</sup> which

(1.) Sufficiently identify the bill.<sup>6</sup>

(2.) Intimate that the bill has been dishonored<sup>7</sup> by non-acceptance or non-payment, and that the party to whom notice is given is held liable.<sup>8</sup>

*Explanation 1.*—A misdescription of the bill does not vitiate a notice unless the party to whom notice is given is in fact misled thereby.<sup>9</sup>

#### ILLUSTRATION

A notice to the drawer which describes the bill as payable at the "S. Bank," when in fact it was payable at the "T. Bank,"<sup>10</sup> or which describes a bill of exchange as a note,<sup>11</sup> or which trans-

<sup>1</sup> *Merchants' Bank v. Birch* (1819), 17 Johns. (N. Y.), 25; *Weaver v. Penn* (1875), 27 La. An. 129; Cf. *Linderman v. Guldin* (1859), 34 Pa. St. 54; *Boyd v. Orton* (1863), 16 Wis. 495.

<sup>2</sup> *Goodnow v. Warrey* (1877), 122 Mass. 79.

<sup>3</sup> *Willis v. Green* (1848), 5 Hill (N. Y.), 232; *Miser v. Trovinger* (1857), 7 O. St. 281; *State Bank v. Slaughter* (1844), 7 Blackf. (Ind.) 133. If partners, notice to one, sufficient, *Bouldin v. Page* (1857), 24 Mo. 594; *Hubbard v. Matthews* (1873), 54 N. Y. 43.

<sup>4</sup> *Id.*; *People's Bank v. Keech* (1866), 26 Md. 521.

<sup>5</sup> *Caunt v. Thompson* (1849), 18 L. J. C. P. at 127.

<sup>6</sup> *Shelton v. Braithwaite* (1841), 7 M. & W. 436; *Mills v. Bank* (1826), 11 Wheat. (U. S.) 431; *Gates v. Beecher* (1875), 60 N. Y. at 527.

<sup>7</sup> *Gilbert v. Dennis* (1842), 3 Met. (Mass.), 495. See Arts. 159, 170, defining "dishonor."

<sup>8</sup> *Allen v. Edmundson* (1848), 2 Exch. at 723, Parke, B.; *Metcalfe v. Richardson* (1852), 11 C. B. at 1014, Williams, J.; *Everard v. Watson* (1833), 1 E. & B. at 804, Lord Campbell.

<sup>9</sup> *Bank v. Carneal* (1829), 2 Pet. (U. S.) 543; *Thompson v. Williams* (1859), 14 Cal. 160.

<sup>10</sup> *Bromage v. Vaughan* (1846), 16 L. J. Q. B. 10.

<sup>11</sup> *Stockman v. Parr* (1843), 11 M. & W. 809; *Bain v. Gregory* (1866), 14 L. T. N. S. 601.

poses the names of drawer and acceptor,<sup>1</sup> or which describes the acceptor by a wrong name,<sup>2</sup> or which misstates the sum payable,<sup>3</sup> may be sufficient. Notice of dishonor, required in form.

NOTE.—If the note is correctly and sufficiently described, it is not material that the indorser is left in doubt as to which one of several similar notes indorsed by him the notice of dishonor refers.<sup>4</sup>

*Explanation 2.*—The notice need not expressly state that the bill has been presented and dishonored,<sup>5</sup> or protested, if protest be necessary,<sup>6</sup> or that the party to whom notice is sent is called on to pay the bill.<sup>7</sup> It is sufficient that these facts can be reasonably inferred from the terms of the notice.

#### ILLUSTRATIONS.

1. "B.'s acceptance for \$50 due on Saturday is unpaid. He has promised to pay it in a week. I shall be glad to see you upon it." (Perhaps) insufficient.<sup>8</sup>

2. "I give notice that a bill, etc. (description), indorsed by you lies at 1, X. Street, dishonored." Sufficient.<sup>9</sup>

3. The holder's clerk wrote to an indorser that "B.'s acceptance due that day was unpaid, and requested his immediate attention to it." Sufficient.<sup>10</sup>

<sup>1</sup> *Mellersh v. Rippen* (1852), 7 Exch. 578; Cf. *Dennistoun v. Stewart* (1854), 17 How. (U. S.) 606.

<sup>2</sup> *Harpham v. Child* (1859), 1 F. & F. 652.

<sup>3</sup> *Bank v. Swarm* (1835), 9 Pet. (U. S.) 33; *Snow v. Perkins* (1851), 2 Mich. 238.

<sup>4</sup> *Hodges v. Shuler* (1860), 22 N. Y. 115. But Cf. *Cook v. Litchfield* (1853), 9 N. Y. 279; rev'g 5 Sandf. (N. Y.) 330.

<sup>5</sup> *Paul v. Joel* (1859), 23 L. J. Ex. 143. But Cf. *Gilbert v. Dennis* (1842), 3 Met. (Mass.) 495.

<sup>6</sup> *Ex parte Lowenthal* (1874), 9 L. R. Ch. 591.

<sup>7</sup> *King v. Bickley* (1842), 2 Q. B. 419; *Miers v. Brown* (1843), 11 M. & W. 372; *Chard v. Fox* (1849), 14 Q. B. 200; *Bank v. Carneal* (1829), 2 Pet. (U. S.) 542; *Townsend v. Lorain Bank* (1853), 2 O. St. 345.

<sup>8</sup> *Furze v. Sharwood* (1841), 2 Q. B. 388.

<sup>9</sup> *King v. Bickley*, *supra*.

<sup>10</sup> *Bailey v. Porter* (1845), 14 M. & W. 44 (notice lost and secondary evidence given of contents); Cf. *Cromer v. Platt* (1877), 37 Mich. 132. Contra, *Gilbert v. Dennis*, *supra*; *Townsend v. Lorain Bank*, *supra*; *Page v. Gilbert* (1872), 60 Me. 488; unless bill is payable at bank, *Clark v. Eldridge* (1847), 13 Met. (Mass.), 96.

Notice of dishonor, requisites in form.

4. "Your draft which became due yesterday is unpaid. Unless the same is paid immediately I shall take proceedings. Noting 5s." Sufficient.<sup>1</sup>

5. The following notice left at the drawer's counting-house by the holder's clerk: "B.'s acceptance to A., \$50, due January 1, is unpaid. Payment to D. is requested before 4 p. m." Sufficient.<sup>2</sup>

6. "D. Bank. I beg to intimate that B.'s acceptance to you due 1st January is still unpaid, and I have to request your immediate attention to the same." No signature. Sufficient.<sup>3</sup>

7. Notice to drawer of bill accepted by B: "Yours and B.'s note of hand is now due, and your attention to the same will oblige." Sufficient.<sup>4</sup>

8. The third day of grace falls on July 4th. Notice dated July 4th, stating that "payment has been *this day* duly demanded," is insufficient, though demand was in fact made on July 3d, the proper day. The notice imports no dishonor of the bill.<sup>5</sup>

NOTE.—Notices of dishonor are now construed very liberally, especially in England. The House of Lords in *Solarte v. Palmer* (1834),<sup>6</sup> decided that the notice must inform the holder either in terms or by necessary implication, that the bill had been presented and dishonored. This inconvenient decision was frequently regretted,<sup>7</sup> and was eventually got rid of by considering it merely as a finding on the particular facts.<sup>8</sup> Since 1841 (see illustration 1, *supra*) it does not appear that any notice of dishonor has been held bad by the English Courts on the ground of insufficiency in form. In one case, Coleridge, J., suggested that a notice given by an indorser would be more strictly construed than a notice given by

<sup>1</sup> *Armstrong v. Christiani* (1848), 5 C. B. 687; *Everard v. Watson* (1853), 1 E. & B. 801.

<sup>2</sup> *Paul v. Joel* (1858), 27 L. J. Ex. 380; affirmed 28 L. J. Ex. 143.

<sup>3</sup> *Maxwell v. Brain* (1864), 10 L. T. N. S. 301.

<sup>4</sup> *Bain v. Gregory* (1866), 14 L. T. N. S. 601.

<sup>5</sup> *Ransom v. Mack* (1842), 2 Hill (N. Y.), 587; *Wynn v. Alden* (1847), 4 Den. (N. Y.), 163; *Townsend v. Bank* (1853), 2 O. St. 345. *Contra*, if jury find indorser not misled. *Crocker v. Getchell* (1844), 23 Me. 392; *Journey v. Pierce* (1859), 2 Houst. (Del.) 176.

<sup>6</sup> 1 Bing. N. C. 194.

<sup>7</sup> Cf. *Everard v. Watson* (1853), 1 E. & B. at 804. Lord Campbell.

<sup>8</sup> Per Bramwell, B., *Paul v. Joel* (1858), 27 L. J. Ex. at 384; see, too, *Maxwell v. Brain*, *supra*, at 302.

the holder.<sup>1</sup> On the other hand, it will be seen from *Gilbert v. Dennis* (1842),<sup>2</sup> a case which has been generally followed and approved, that the rule in America is more strict, and the cases seem almost, if not quite, in harmony with *Solarte v. Palmer*. The late case of *Cromer v. Platt* (1877),<sup>3</sup> however, appears to support the later English doctrine. It is now well settled in England and America, contrary to *Solarte v. Palmer*, that the mere fact of giving notice, is a sufficient indication that the party to whom notice is sent is called on to pay the bill.<sup>4</sup>

Notice of dishonor. requisites in form.

*Explanation 3.*—A written notice of dishonor need not be signed,<sup>5</sup> but the party notified must in some way be informed from whom it proceeds.<sup>6</sup>

*Explanation 4.*—An insufficient written notice may be supplemented and made valid by a personal communication.<sup>7</sup>

*Explanation 5.*—When notice is given by personal communication,<sup>8</sup> or when a written notice is supplemented by a personal communication,<sup>9</sup> the sufficiency of such notice is a question of fact.

#### ILLUSTRATIONS.

A person sent by the holder goes to the house of the drawer, who is not a trader, and not finding the drawer informs his wife that he has brought back the bill dishonored. The wife says she will tell her husband. This may be sufficient.<sup>10</sup>

2. The holder's clerk goes to the drawer and tells him that

<sup>1</sup> Cf. *East v. Smith* (1847), 16 L. J. Q. B. 292, *sed qu.*?

<sup>2</sup> 3 Met. (Mass.) 495.

<sup>3</sup> 37 Mich. 132.

<sup>4</sup> *Chard v. Fox* (1849), 14 Q. B. 200; *Bank v. Carneal* (1829), 2 Pet. (U. S.) at 552; *Townsend v. Bank*, (1835), 2 O. St. at 354.

<sup>5</sup> *Maxwell v. Brain* (1864), 10 L. T. N. S. 301; Cf. *Paul v. Joel*, (1858), 27 L. J. Ex. 380.

<sup>6</sup> *Klockenbaum v. Pierson* (1860), 16 Cal. 375; *Walker v. Bank* (1844), 8 Mo. 704.

<sup>7</sup> *Houlditch v. Cauty* (1838), 4 Bing. N. C. 411; Cf. *Paul v. Joel*, *supra*, at 384.

<sup>8</sup> *Metcalfe v. Richardson* (1852), 11 C. B. 1011.

<sup>9</sup> *Houlditch v. Cauty* (1838), 4 Bing. N. C. at 419; Cf. *Paul v. Joel*, *supra*.

<sup>10</sup> *Housego v. Cowne* (1837), 2 M. & W. 348.

Notice of dishonor, requisites in form.

his bill has been presented, and that the acceptor cannot pay it. The drawer replies that he will see the holder about it. This may be sufficient.<sup>1</sup>

3. A notary's clerk takes the bill, with the notary's ticket attached, to the drawer's office, and shows it to a clerk there. The clerk looks at it, says the drawer is out and has left no orders. The notary then leaves the usual notice that the bill is due at his office. This may be sufficient.<sup>2</sup>

Excuses for not giving notice of dishonor.

Art. 200. Notice of dishonor is dispensed with—

- (1.) When the drawer or indorser sought to be charged is, as between the parties to the bill, the principal debtor, and has no reason to expect that it will be honored on presentment.

#### ILLUSTRATIONS.

1. A. draws a bill on B., who is under no obligation to accept or pay it, and has not held out that he will do so. It is presented and dishonored. A. is not entitled to notice.<sup>3</sup>

2. A. draws a bill on B. payable at his own house. B. accepts it. *Prima facie* this is an accommodation bill for A.'s benefit, and he is not entitled to notice.<sup>4</sup>

3. A. signs a bill as drawer in order to accommodate the acceptor. A. is entitled to notice.<sup>5</sup>

4. A., having a small balance in B.'s hands, draws on him for a larger sum. B. *accepts*, but does not pay. A. is entitled to notice.<sup>6</sup>

<sup>1</sup> *Metcalfe v. Richardson* (1852), 11 C. B. 1011.

<sup>2</sup> *Viale v. Michael* (1874), 30 L. T. N. S. 463. For further illustration, see *Phillips v. Gould* (1838), 8 C. & P. 355; *East v. Smith* (1847), 16 L. J. Q. B. 292; *Chard v. Fox* (1849), 14 Q. B. 200; *Jennings v. Roberts* (1855), 24 L. J. Q. B. 102.

<sup>3</sup> *Bickerdike v. Bollman* (1786), 1 T. R. 405, and Smith's L. Ca. 7 ed. p. 50 and notes; *Claridge v. Dalton* (1815), 4 M. & S. 225; *Dickins v. Beal* (1836), 10 Pet. (U. S.) 572; *Wirth v. Austin* (1875), 10 L. R. C. P. 689; *Welch v. B. C. Mfg. Co.* (1876), 82 Ill. 579.

<sup>4</sup> *Sharp v. Bailey* (1829), 9 B. & C. 44; Cf. *Carter v. Flower* (1847), 16 M. & W. 743; *Reid v. Morrison* (1841), 2 W. & S. (Pa.) 401; *Torrey v. Foss* (1855), 40 Me. 74.

<sup>5</sup> *Sleigh v. Sleigh* (1850), 5 Exch. 514; Cf. *French v. Bank* (1807), 4 Cranch (C. Ct.), at 160.

<sup>6</sup> *Thackray v. Blackett* (1812), 3 Camp. 164; Cf. *Bagnall v. Andrews* (1830), 7 Bing. at 223.

5. A., having a balance of \$10 at his banker's, and having Excuses for not giving notice of dishonor. no authority to overdraw, draws a check for \$50. A. is not entitled to notice.<sup>1</sup>

6. A. draws, B. accepts, and C. indorses a bill in order to accommodate D., the second indorser. If the bill is dishonored, A. and C. are entitled to notice.<sup>2</sup>

7. A. draws and B. accepts a bill to accommodate X., who is not a party to it, but who is to provide for it. A. is entitled to notice of dishonor.<sup>3</sup>

8. A. draws, B. accepts, and C. indorses a bill in order to raise money for their joint benefit. A. and C. are entitled to notice.<sup>4</sup>

NOTE.—Cf. Art. 90, accommodation bill defined, and Art. 168, excuses for non-presentment. The acceptor is the principal debtor on the face of the instrument, but evidence is admissible to show that he is in reality a mere surety, and that some other person is ultimately liable.<sup>5</sup> As to French law, see Art. 190, n.

- (2.) As regards the drawer, when drawer and drawee are the same person, or identical in interest.<sup>6</sup>

#### ILLUSTRATION.

A bill drawn by A. & Co. is accepted by B. & Co., the two firms having a common partner. A. & Co. are entitled to have the bill presented for payment,<sup>7</sup> but are not entitled to notice.<sup>8</sup>

- (3.) When the drawer or indorser sought to be charged is the person to whom the bill is presented for payment.

<sup>1</sup> *Carew v. Duckworth* (1869), 4 L. R. Ex. 813; Cf. *Hopkirk v. Page* (1822), 2 Brock. (C. Ct.) 20; *Blankenship v. Rogers* (1858), 10 Ind. 333.

<sup>2</sup> *Cory v. Scott* (1820), 3 B. & Ald. 619; *Turner v. Samson* (1876), 2 L. R. Q. B. D. 22, C. A.; *French v. Bank* (1807), 4 Cranch (C. Ct.), at 161.

<sup>3</sup> *Lafitte v. Slatter* (1830), 6 Bing. 623.

<sup>4</sup> *Foster v. Parker* (1876), 2 L. R. C. P. D. 18.

<sup>5</sup> Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 127, per Willes, J.

<sup>6</sup> Art. 2, Expl. 3; *Porthouse v. Parker* (1807), 1 Camp. 82; *Rhett v. Poe* (1844), 2 How (U. S.), 457.

<sup>7</sup> *Dwight v. Scovil* (1818), 2 Conn. 654.

<sup>8</sup> *New York Bank v. Selma Bank* (1874), 51 Ala. 305; Cf. *Fuller v. Hooper* (1855), 3 Gray (Mass.), 334; *West Bank v. Fulmer* (1846), 3 Pa. St. 599.



Excuses for not  
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## ILLUSTRATION.

The indorser of a bill becomes the executor of the acceptor. It is presented to him and he refuses to pay it. He is not entitled to notice.<sup>1</sup>

NOTE.—But this is doubtful. See *Bigelow*, p. 376, § 4. It may be remarked, however, that there are no cases necessarily opposed to the rule deduced from *Caunt v. Thompson*. Clearly, presentment for payment is not dispensed with (*Magruder v. Union Bank*, see at 91), and in *Juniata Bank v. Hale*, it does not appear that the indorser sought to be charged was the person to whom the note was presented for payment.

- (4.) When the drawee is a fictitious person; or (perhaps) a person not having capacity to contract, and the drawer or indorser sought to be charged was aware of the fact at the time he drew or indorsed the bill.<sup>2</sup>
- (5.) When the drawer or indorser sought to be charged has received an assignment of all the property of the acceptor as security against his liability.<sup>3</sup> Cf. Art. 168, cl. (3).

NOTE.—This is justly questioned in *Daniel*, §§ 1130–1131. But it is submitted that the learned author's conclusion that the decisions rest upon the ground that the property was received for the express purpose of meeting the acceptor's liability, is erroneous. This distinction should be noticed: If the property is received for the express purpose of meeting the primary and absolute liability of the acceptor, then clearly notice is dispensed with, as he changes place with the acceptor and becomes himself the principal;<sup>4</sup> but if the property is received for the purpose of meeting *his own* liability, then it should be regarded only as security against a liability conditional on demand and notice, though held otherwise in the cases cited,<sup>5</sup> on

<sup>1</sup> *Caunt v. Thompson* (1849), 18 L. J. C. P. 125. But Cf. *Juniata Bank v. Hale* (1827), 16 S. & R. (Pa.) 157; *Magruder v. Union Bank* (1830), 3 Pet. (U. S.) 87.

<sup>2</sup> *Leach v. Hewitt* (1813), 4 Taunt. 731; *Smith v. Bellamy* (1817), 2 Stark. 223. But Cf. *Wyman v. Adams* (1853), 12 Cush (Mass.) 210.

<sup>3</sup> *Mechanics' Bank v. Griswold* (1831), 7 Wend. (N. Y.) 165; *Barlow v. Baker* (1815), 1 S. & R. (Pa.) 334; *Bond v. Farnsworth* (1809), 5 Mass. 170; Cf. *Spencer v. Harvey* (1837), 17 Wend. (N. Y.) at 490.

<sup>4</sup> Cf. *Wilson v. Senier* (1861), 14 Wis. at 386, 387; *Woodbury v. Crum* (1859), 1 Bliss. (C. Ct.) 284.

the ground that as the indorser has received all the acceptor's property, demand would be fruitless. But in accordance with this reasoning, it is well settled that the mere receipt of a part of the acceptor's property as collateral security, whether the security is sufficient to meet the bill or not, does not dispense with demand and notice,<sup>1</sup> though some courts hold the contrary where the security is sufficient and the indorser fully indemnified.<sup>2</sup>

(6.) When, after the exercise of reasonable diligence, notice of dishonor cannot be given to or does not reach the party sought to be charged.<sup>3</sup>

*Explanation 1.*—Reasonable diligence is a mixed question of law and fact.<sup>4</sup>

#### ILLUSTRATIONS.

1. The holder of a dishonored bill goes to the drawer's place of business during business hours to give him notice of dishonor. He finds the place shut and no one there of whom to make inquiries. This may excuse notice.<sup>5</sup>

2. The holder of a bill duly addresses and posts a notice of dishonor. It is lost in the post. The drawer or indorser to whom it was sent is not discharged.<sup>6</sup>

3. The holder of a dishonored bill does not know the indorser's address. He makes some inquiry, but does not take the steps he reasonably might have done. The indorser is discharged.<sup>7</sup>

<sup>1</sup> *Kramer v. Sandford* (1842), 4 W. & S. (Pa.) 328; *Creamer v. Perry* (1835), 17 Pick. (Mass.) 332; *Haskell v. Boardman* (1864), 8 Allen (Mass.), 88; *Taylor v. French* (1855), 4 E. D. Sm. (N. Y.) 458; *Wilson v. Senier* (1861), 14 Wis. 380.

<sup>2</sup> *Develing v. Ferris* (1849), 18 O. 170; Cf. *Marshall v. Mitchell* (1853), 35 Me. at 223.

<sup>3</sup> *Allen v. Edmundson* (1848), 2 Exch. at 723; *Walker v. Stetson* (1862), 14 O. St. 89.

<sup>4</sup> *Bank of Utica v. Bender* (1839), 21 Wend. (N. Y.) 643; *Linville v. Welch* (1859), 29 Mo. 203; *Walker v. Stetson*, *supra*. But see *Bateman v. Joseph* (1810), 2 Camp. at 462; *Herbert v. Servin* (1879), 41 N. J. L. 225 (fact).

<sup>5</sup> *Allen v. Edmundson*, *supra*; *Williams v. Bank* (1829), 2 Pet. (U. S.) 96.

<sup>6</sup> *Mackay v. Judkins* (1858), 1 F. & F. 208, Byles, J.; Cf. Arts. 193 and 194, n.

<sup>7</sup> *Beveridge v. Burgis* (1812), 3 Camp. 262; *Spencer v. Bank* (1842), 3 Hill (N. Y.), 520.

Excuses for not giving notice of dishonor.

4. A bill is accidentally destroyed before maturity. The holder gives notice of the fact to the drawer. At maturity the holder cannot obtain payment. He must give notice of dishonor to the drawer.<sup>1</sup>

*Explanation 2.*—The fact that the drawer or indorser sought to be charged has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for giving him notice of dishonor.<sup>2</sup>

#### ILLUSTRATION.

The drawer or indorser of a bill has notice that the acceptor is bankrupt<sup>3</sup> or dead.<sup>4</sup> He is entitled to notice of dishonor.

*Explanation 3.*—The bankruptcy or death of the drawer or an indorser does not dispense with the necessity for giving notice of dishonor to him or his representatives.<sup>5</sup>

(7) By waiver express or implied.

*Explanation 1.*—Notice of dishonor may be waived before the time for giving notice has arrived, or after the omission to give notice.<sup>6</sup>

#### ILLUSTRATIONS.

1. The drawer of a bill tells the holder before it is due that he has no fixed residence, and that he will call in a few days to see if the acceptor has paid the bill. This waives notice.<sup>7</sup>

<sup>1</sup> *Thackray v. Blackett* (1812), 3 Camp. 164; Cf. Art. 165.

<sup>2</sup> Cf. *Carew v. Duckworth* (1869), 4 L. R. Ex. at 319; and Art. 188.

<sup>3</sup> *Esdaille v. Sowerby* (1809), 11 East, 114; *Smith v. Becket* (1810), 18 East, 187; *Juniata Bank v. Hale* (1827), 16 S. & R. (Pa.) 157; *Cedar Falls Co. v. Wallace* (1880), 83 N. C. 225; Cf. French Code, Art. 163.

<sup>4</sup> *Barton v. Baker* (1815), 1 S. & R. (Pa.) 334; Cf. *Caunt v. Thompson* (1849), 18 L. J. C. P. 125; French Code, Art. 163, *Pothier*, No. 147.

<sup>5</sup> *Rhode v. Proctor* (1825), 4 B. & C. 517; and Art. 198, Expl. 3; *Ex parte Tremont Bank*, 16 Bankr. Reg. 397; *Smalley v. Wright* (1878), 40 N. J. (L.) 471.

<sup>6</sup> Cf. *Cordery v. Colville* (1863), 32 L. J. C. P. 210; *Sigerson v. Matthews* (1857), 20 How. (U. S.) 496; *Armstrong v. Chadwick* (1879), 127 Mass. 156.

<sup>7</sup> *Phipson v. Kellner* (1815), 4 Camp. 284; Cf. *Burgh v. Legge* (1839), 5 M. & W. 418.

2. The drawer of a bill orders the drawee not to pay it. Excuses for not giving notice of dishonor. This (probably) waives notice.<sup>1</sup>

3. The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice.<sup>2</sup>

4. The indorser of a bill receives no notice of dishonor. Six weeks after the dishonor he meets the holder and promises to pay the bill. This is a waiver of notice.<sup>3</sup>

5. The indorser of a bill, knowing that no notice of dishonor has been given him, pays part of the amount. This is a waiver of notice.<sup>4</sup>

6. The indorser of a note, knowing that no notice has been given him, on being asked what is to be done about the note, replies, "The note will be paid." This is not a waiver of notice.<sup>5</sup>

7. A., the drawer of a bill, indorses it to C., who indorses it to D. On the day of dishonor, but before the fact of dishonor could be known, A., knowing the acceptor to be insolvent, says to C., "I suppose I shall have to take up the bill. If you will call with it in a few days I will pay it." D. gives no notice of dishonor either to C. or A. D. cannot hold A. as indorser, as the language does not import an absolute promise to pay, but an unwillingness to pay coupled with the fear that he would be compelled to pay.<sup>6</sup>

8. A., the drawer of a bill, indorses it to C., who indorses it to D. Some time after the dishonor, A., who has received no notice, is informed by C. that D., the holder, is going to sue him. A. says he will pay if D. will give him time. This is evidence of waiver of notice.<sup>7</sup>

NOTE.—Cf. Art. 121, as to express waiver. Art. 168 cl. (6), waiver of presentment.

<sup>1</sup> *Hill v. Heap* (1823), D. & R. N. P. C. 57; Cf. *Havens v. Talbot* (1858), 11 Ind. 323.

<sup>2</sup> *Brett v. Levitt* (1811), 13 East, at 214; Cf. *Minturn v. Fisher* (1857), 7 Cal. 573; *Taylor v. French* (1855), 4 E. D. Sm. (N. Y.) 458.

<sup>3</sup> *Cordery v. Colville* (1863), 32 L. J. C. P. 210; *Rindskopf v. Doman* (1876), 28 O. St. 516; *Freeman v. O'Brien* (1874), 38 Ia. 407; *Givens v. Bank* (1877), 85 Ill. 442.

<sup>4</sup> *Knapp v. Runals* (1875), 37 Wis. 135; *Newberry v. Troubridge* (1865), 13 Mich. 264.

<sup>5</sup> *Creamer v. Perry* (1835), 17 Pick. (Mass.) 332.

<sup>6</sup> *Pickin v. Graham* (1833), 1 Cr. & M. 725.

<sup>7</sup> *Woods v. Dean* (1862), 32 L. J. Q. B. 1. See further, *Lecann v. Kirkman* (1859), 6 Jur. N. S. 17; *North Stafford Co. v. Wythies* (1861), 2 F. & F. 563; *Kilby v. Rochusson* (1865), 18 C. B. N. S. 357; *Sheldon*

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*Explanation 2.*—Waiver of notice of dishonor in favor of the holder enures for the benefit of parties prior to such holder as well as subsequent holders.

#### ILLUSTRATION.

C. indorses a bill to D., who indorses it to E. If C. be sued by E., and let judgment go by default, he cannot set up want of notice of dishonor if he be subsequently sued by D.<sup>1</sup>

*Explanation 3.*—Waiver of notice of dishonor by an indorser does not affect prior parties.

#### ILLUSTRATION.

C., the payee of a bill, indorses it to D. D. gives notice of dishonor to C. one day late. C. waives the irregularity, takes up the bill and gives notice to the drawer. C. cannot sue the drawer.<sup>2</sup>

*Explanation 4.*—A verbal waiver of notice may be revoked before the time for giving notice has expired.<sup>3</sup>

*Explanation 5.*—An acknowledgment of liability must be made with full knowledge of the facts in order to operate as a waiver of notice of dishonor.<sup>4</sup>

#### ILLUSTRATION.

A bill is refused payment at maturity. The indorser promises the holder to pay it, not knowing that it had been previously dishonored by non-acceptance. This is no waiver.

NOTE.—Many of the cases fail to distinguish between admissions of liability, which are evidence of due notice having been received, and admissions of liability when due notice has not been given, and which therefore are evidence of waiver. The distinction is important.<sup>5</sup>

*v. Horton* (1870), 43 N. Y. 93; *Gore v. Vining* (1843), 7 Met. (Mass.) 212; *Bryant v. Wilcox* (1874), 49 Cal. 47.

<sup>1</sup> *Rabey v. Gilbert* (1861), 38 L. J. Ex. 170. See *Johnson v. Crane* (1844), 16 N. H. 174; Cf. Art. 184.

<sup>2</sup> *Turner v. Leach* (1821), 4 B. & Ald. 451; Cf. Art. 192.

<sup>3</sup> *Second Nat. Bank v. McGuire* (1877), 33 O. St. 295; S. C., 31 Amer. R. 539.

<sup>4</sup> *Goodall v. Dolley* (1787), 1 T. R. 712; *Thorn'ou v. Wynn* (1827), 12 Wheat. (U. S.) 183; *Walker v. Rogers* (1866), 40 Ill. 278; *Third Nat. Bank v. Ashworth* (1870), 105 Mass. 503; *Rindskopf v. Doman* (1876), 28 O. St. 516.

<sup>5</sup> As to what is evidence of due notice, see *Taylor v. Jones* (1809), 2

Art. 201. Delay in giving notice of dishonor is excused when such delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his negligence. <sup>Expenses for delay in notice.</sup>

*Explanation.*—When the cause of delay ceases to operate, notice must be given with reasonable diligence.<sup>1</sup>

#### ILLUSTRATIONS.

1. The indorser of a bill gives a wrong address, or by his conduct misleads the holder as to his address. In consequence a notice posted in due time is a long while in reaching him. The delay is excused and the indorser is liable.<sup>2</sup>

2. The holder of a bill does not know the indorser's address. Delay occupied in making inquiries is excused.<sup>3</sup>

**NOTE.**—For further illustration and authority see Art. 169, and Art. 193. This article is an obvious deduction from the general rule (Art. 195) that notice of dishonor must be given within a reasonable time. The old system of pleading recognized the difference between excuses for delay and excuses for non-notice.<sup>4</sup> When the delay is caused by the negligence of the party to whom notice is sent, it is conceived that though that party is bound he cannot give an effectual notice to antecedent parties.<sup>5</sup>

*Overdue Bill.*—In America it is held that when a bill is indorsed after its maturity, the indorser is entitled to have it

Camp. 105; *Hicks v. Beaufort* (1838), 4 Bing. N. C. 239; *Brownell v. Bonney* (1841), 1 Q. B. 39; *Curlewis v. Corfield* (1841), 1 Q. B. 814; *Campbell v. Webster* (1845), 15 L. J. C. P. 4; *Mills v. Gibson* (1847), 16 L. J. C. P. 249; *Jackson v. Collins* (1848), 17 L. J. Q. B. 142; *Bartholomew v. Hill* (1862), 5 L. T. N. S. 756. As to what is not, *Barradale v. Loece* (1811), 4 Taunt. 93; *Braithwaite v. Coleman* (1835), 4 Nev. & M. 654; *Bell v. Frankis* (1842), 4 M. & G. 446; *Holmes v. Staines* (1850), 3 C. & K. 19.

<sup>1</sup> *Firth v. Thrush* (1823), 8 B. & C. 387; *Gladicell v. Turner* (1870), 5 L. R. Ex. at 61; *McVeigh v. Allen* (1877), 29 Grat. (Va.), 588; Cf. Art. 169.

<sup>2</sup> *Hewitt v. Thompson* (1836), 1 M. & Rob. 543; *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. 639.

<sup>3</sup> *Baldwin v. Richardson* (1823), 1 B. & C. 245; *Fugitt v. Nixon* (1869), 44 Mo. 295.

<sup>4</sup> *Allen v. Edmundson* (1848), 2 Exch. at 723.

<sup>5</sup> Cf. *Shelton v. Braithwaite* (1841), 8 M. & W. at 254-255.

Excuses for delay in notice.

presented for payment, and to receive notice of dishonor within a reasonable time, he in effect having indorsed a bill payable on demand;<sup>1</sup> *aliter*, if an indorser take up a dishonored bill and re-issue it on his original indorsement, for his liability is already fixed.<sup>2</sup> The English law upon this subject was very obscure, until the British Code, § 10 (2), which adopted the American rule. Under German Exchange Law, Art. 16, the indorser of an overdue bill incurs no mercantile engagement.

Conflict of laws.

Art. 202. Where laws conflict, the validity of a notice of dishonor, both as to form and time, is (probably) determined by the law of the place where the notice is given.<sup>3</sup>

#### ILLUSTRATION.

A., in England, draws and indorses to C. a bill payable in Spain. C. indorses it to D., in Spain. It is presented for acceptance and dishonored. Fifteen days afterwards, D. gives notice of dishonor to C., who immediately gives notice to A. By Spanish law no notice of dishonor by non-acceptance is necessary (Cf. Art. 157 n.). C. is liable to D., and if he pays him, he can sue A.<sup>4</sup>

NOTE.—It would be convenient to hold generally that the duties of the holder are to be determined by the law of the place where they are performed, but the cases certainly have not yet gone so far as this.

#### *Notice to Charge Acceptor, Maker, or Stranger.*

Notice to acceptor unnecessary.

Art. 203. The acceptor of a bill is not in any case entitled to notice of dishonor.<sup>5</sup>

<sup>1</sup> *Patterson v. Todd* (1852), 18 Pa. St. 433; *Eisenlord v. Dillenback* (1878), 15 Hun (N. Y.), 23; aff'd 79 N. Y. 617; *Light v. Kingsbury* (1872), 50 Mo. 331; *McKewer v. Kirtland* (1871), 33 Ia. 348; Cf. Art. 162.

<sup>2</sup> *St. John v. Roberts* (1865), 31 N. Y. 441; Cf. *Libbey v. Pierce* (1867), 47 N. H. 307.

<sup>3</sup> *Hirschfield v. Smith* (1866), 1 L. R. C. P. 340; *Aymar v. Sheldon* (1834), 12 Wend. (N. Y.), 439; *Nat. Bank v. Green* (1871), 33 Ia. 140; *Pothier*, No. 155. *Contra*, *Ellis v. Commercial Bank* (1843), 7 How. (Miss.) 294; Cf. Art. 180.

<sup>4</sup> *Horne v. Rouquette* (1878), 3 L. R. Q. B. D. 514, C. A.

<sup>5</sup> Cf. *Rowe v. Tipper* (1853), 22 L. J. C. P. at 137; *Pearse v. Pemberthy* (1812), 3 Camp. 261 (maker).

## ILLUSTRATION.

Notice to ac-  
ceptor unne-  
cessary.

B. accepts a bill payable at his banker's. It is presented there and dishonored. No notice need be given to B.<sup>1</sup>

Art. 204. Notice of dishonor is not a condition precedent to the liability of a person who has given a guarantee for the payment of a bill by the acceptor. Cf. Art. 173.

## ILLUSTRATIONS.

1. The indorser of a bill gives a bond to secure its payment. Want of notice of dishonor is no defense to an action on the bond.<sup>2</sup>

2. X. gives a guarantee for the price of goods to be supplied to the acceptor of a bill. X. is not entitled to notice of dishonor.<sup>3</sup>

3. X. gives a guarantee for the price of goods to be supplied to the drawer of a bill. X. is entitled to notice of dishonor.<sup>4</sup>

4. X. guarantees the payment of a note, "if it be not duly honored and paid" by the maker. X. is not entitled to notice of dishonor.<sup>5</sup>

NOTE.—In America the authorities conflict. No case has yet arisen calling for a decision on the necessity of notice to charge a guarantor of the contract of a party secondarily liable as drawer or indorser, but we cannot conceive how a guarantor could be held liable when the indorser whose contract he guaranteed has been discharged by failure to give notice to him of the acceptor's default. But why the guarantor should be held entitled to notice in such case, as held in *Phillips v. Astling*,<sup>6</sup> is not so clear.<sup>7</sup> As to the liability of a guarantor of the contract of a party primarily liable as acceptor or maker, there are two classes of cases. (1) Notice to the guarantor is held a condition precedent to his liability, but it may be given

<sup>1</sup> *Treacher v. Hinton* (1821), 4 B. & Ald. 413.

<sup>2</sup> *Murray v. King* (1821) 5 B. & Ald. 165; *F. & M. Bank v. Kercheval* (1853), 2 Mich. 504.

<sup>3</sup> *Holbrow v. Wilkins* (1822), 1 B. & C. 10.

<sup>4</sup> *Phillips v. Astling* (1809), 2 Taunt. 206; Cf. *Hitchcock v. Humphrey* (1843), 5 M. & G. at 564. *Sed qu?* see note *infra*.

<sup>5</sup> *Walton v. Mascall* (1844), 13 M. & W. 72, see also at 452.

<sup>6</sup> See *Bigelow*, p. 140.



**Guarantor.** at any time before suit. If, however, the guarantor is damaged by the delay in giving notice, he is discharged to the extent of the damage.<sup>1</sup> (2) But by the weight of authority, notice is not a condition precedent to his liability, but the guarantor is discharged to the extent he is damaged by failure to give him reasonable notice of the principal's default.<sup>2</sup> It is prudent to give a guarantor some notice. See *Story*, Notes, 7th ed. § 460. note, for a clear presentation of this subject.

**Person liable on consideration.**

Art. 205. A person who is not a party to a bill, but who is liable on the consideration for which it is given,<sup>3</sup> is (probably) entitled to notice of dishonor. Cf. Art. 174.

#### ILLUSTRATIONS.

1. X. buys goods from D. to be paid for "by approved banker's bill." C., who is X.'s broker, obtains a banker's bill payable to his own order and indorses it to D. If the bill be dishonored, X. (probably) is not liable for the price of the goods unless he receives notice of dishonor.<sup>4</sup>

2. C., the *holder* of a note payable to bearer on demand, transfers it to D., without indorsing it, to pay for goods supplied by D. If the note be dishonored, C. is not liable for the price of the goods unless he receives notice of dishonor.<sup>5</sup>

**NOTE.**—It seems from the last cited cases<sup>6</sup> that the same strict and technical notice of dishonor is not requisite to charge a person liable on the consideration as is requisite to charge a party liable on the bill. This is fair, for in the one case the liability is transferable, in the other it is not, and therefore all defenses between the parties can be inquired into. A distinction might be drawn between persons liable on the consideration who have, and who have not, been holders of the bill.<sup>6</sup>

<sup>1</sup> *Geiger v. Clark* (1859), 13 Cal. 579; *Crooks v. Tully* (1875), 50 Cal. 254; *Foot v. Brown* (1841), 2 McL. (C. Ct.) 369; Cf. *Bickford v. Gibbs* (1851) 8 Cush. (Mass.) at 156; *Usley v. Jones* (1858), 12 Gray (Mass.), 260.

<sup>2</sup> *Brown v. Curtis* (1849), 2 N. Y. 225; *Second Nat. Bank v. Gaylord* (1872), 34 Ia. 245; *McDonald v. Scott* (1871), 8 Kans. 25; *Voltz v. Harris* (1866), 40 Ill. 155; *Gage v. Lewis* (1873), 68 Ill. 605; *Newton W. Co. v. Diers* (1880), 10 Neb. 284.

<sup>3</sup> Cf. Arts. 224, 225.

<sup>4</sup> *Smith v. Mercer* (1867), 3 L. R. Ex. 51. *Contra, Swinyard v. Bouces* (1816) 3 M. & S. 62, not cited.

<sup>5</sup> *Canidge v. Allenby* (1827), 6 B. & C. 373; *Turner v. Stones* (1843), 1 D. & L. 122; *Robson v. Oliver* (1847), 10 Q. B. 707, cases on country bank notes; *Dayton v. Trull* (1840), 23 Wend. (N. Y.) 345; Cf. Art. 225.

<sup>6</sup> *Id.* at 381.

*Duties on Receiving Payment.*

Art. 206. It is the duty of the holder to deliver up the bill when it is paid in due course, by or on behalf of the drawee or acceptor.<sup>1</sup> Cf. Art. 165.

*Exception 1.*—Non-negotiable note.<sup>2</sup>

*Exception 2.*—The person who was the holder of a bill is (perhaps) entitled to receive payment without giving it up, on proof of its destruction.<sup>3</sup>

NOTE.—Cf. Art. 144 as to lost bills, and Arts. 27 and 29 as to the parts of the set. Giving up the bill is a concurrent condition, and not a condition precedent to payment. German Exchange Law, Arts. 38–39, provides that the holder must take part payment if it be offered. In that case he may retain the bill, but must indorse upon it the amount he has received.

<sup>1</sup> *Hansard v. Robinson* (1827), 7 B. & C. at 94; *Otisfield v. Mayberry* (1874), 63 Me. 197; *Crowe v. Clay* (1854), 9 Exch. 604, Ex. Ch.; *Ocean Bank v. Fant* (1871), 50 N. Y. at 476; *Crandall v. Schroepfel* (1874), 1 Hun (N. Y.), 557; *Arnold v. Dresser* (1864), 8 Allen (Mass.), 435; German Exchange Law, Art. 39; Cf. *Jones v. Broadhurst* (1850), 9 C. B. at 182, and *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), L. R. 6 App. Cas. at p. 18, H. L., as to payment by drawer or indorser; and *Corner v. Taylor* (1854), 10 Exch. 441; *Woodward v. Pell* (1868), 4 L. R. Q. B. 55, lien for costs.

<sup>2</sup> *Charnley v. Grundy* (1854), 14 C. B. at 614; Cf. Art. 107.

<sup>3</sup> *Wright v. Maidstone* (1855), 24 L. J. Ch. 623. See Art. 144, cl. (1.)

## CHAPTER VI.

### LIABILITIES OF PARTIES.

#### *Drawee and Drawer.*

Duty to accept  
or pay.

Art. 208. The drawee of an unaccepted bill of exchange is not bound to accept or pay it unless he has, for valuable consideration, expressly or impliedly agreed so to do. If he has so agreed, his relations with the drawer are regulated by the terms of the particular agreement between them.<sup>1</sup>

*Exception.*—Check on a banker.<sup>2</sup>

NOTE.—In some continental countries the duty to accept or pay bills arises from the mere relationship of debtor and creditor in a mercantile transaction;<sup>3</sup> whereas here there must be an agreement founded on consideration. Apart from something special in the contract, it seems that the authority or obligation to accept is not revoked by the death of the drawer,<sup>4</sup> while it is by notice of his bankruptcy; for this renders funds in the hands of the drawee no longer available for the payment of the bill, and incapacitates the drawer from fulfilling his part of the contract.<sup>5</sup> The bankruptcy of the drawee is not *per se*

<sup>1</sup> *Chitty*, p. 200; Cf. *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 351, Ex. Ch.; see, e. g., *Smith v. Brown* (1815), 6 Taunt. at 344; *Laing v. Barclay* (1823), 1 B. & C. 398; *Huntley v. Sanderson* (1833), 1 Cr. & M. 467 (agent authorized to draw on principal; contract of indemnity); *Riggs v. Lindsay* (1813), 7 Cranch (C. Ct.), 500; *Cumming v. Shand* (1860), 29 L. J. Ex. at 132 (implied agreement to let customer overdraw); *English Credit Co. v. Arduin* (1871), 5 L. R. H. L. 64 (construction of credit).

<sup>2</sup> Art. 260; Cf. *Goodwin v. Roberts*, *supra*.

<sup>3</sup> *Pothier*, No. 92; *Nouguier*, § 442; Belgian Code de Commerce, Art. 8.

<sup>4</sup> *Chitty*, p. 193; *Story*, § 250; *Cutts v. Perkins* (1815), 12 Mass. 206; Cf. *Billings v. Devaux* (1841), 3 M. & Gr. at 574; *Att.-Genl. v. Pratt* (1874), 9 L. R. Ex. 140.

<sup>5</sup> *Pothier*, No. 96; Cf. *Citizens' Bank v. New Orleans Bank* (1873), 6 L. R. H. L. 352. *Contra*, in case of check, *Roberts v. Corbin* (1868), 26 Ia. 315.

a breach of contract with the drawer.<sup>1</sup> In France the engagement between drawer and drawee is held to be a contract of <sup>Duty to accept</sup> or pay.  
 "mandat," and their relations are regulated accordingly.<sup>2</sup>

*Letter of Advice.*—It is usual, but not necessary, for the drawer to advise the drawee of drafts drawn on him by letter of advice.<sup>3</sup>

Art. 209. When the drawee breaks his contract with the drawer by dishonoring his draft, the consequences reasonably resulting from the breach of contract constitute the measure of damages.<sup>4</sup> <sup>Measure of damages against drawee.</sup>

#### ILLUSTRATIONS.

1. A customer, having a balance of \$200 at his banker's, draws a check for \$100, or accepts a bill for \$100 payable at his banker's. If this check or bill is dishonored he may recover substantial damages for the injury to his credit, without proving any actual loss.<sup>5</sup>

2. A., in a foreign country, draws on B., in England, under a letter of credit. B. dishonors his draft. A. may recover the re-exchange and notarial expenses which he has had to pay to the holder,<sup>6</sup> and also the cost of telegrams, etc., consequent on the dishonor.<sup>7</sup>

NOTE.—Although an acceptor, as such, may not be liable for re-exchange, it is clear that the drawee, by accepting, cannot alter or escape from his special contract with the drawer; and this may be the ground of his liability for re-exchange, etc., when sued by the drawer. Cf. Art. 213, n. As to paying a draft contrary to instructions, see *Twibell v. London Suburban Bank*.<sup>8</sup>

<sup>1</sup> *Re Agra Bank* (1867), 5 L. R. Eq. 160.

<sup>2</sup> *Pothier*, Nos. 91-100; *Bravard-Demangeat*, 7th ed. 219; *Code Civil*, Art. 1984-2010.

<sup>3</sup> *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. at 586; *Nouguier*, § 271-284.

<sup>4</sup> *Prehn v. Royal Bank* (1870), 5 L. R. Ex. 92; Cf. *Ilsley v. Jones* (1858) 12 Gray (Mass.). 260 (accommodation bill).

<sup>5</sup> *Rollin v. Steward* (1854), 23 L. J. C. P. 148; Cf. *Cumming v. Shand* (1860), 29 L. J. Ex. 129; *Summers v. City Bank* (1874), 9 L. R. C. P. 580; *Roberts v. Corbin* (1868), 26 Ia. 315.

<sup>6</sup> *Walker v. Hamilton* (1860), 1 DeG., F. & J. 602; *Re General So. Am. Co.* (1877), 7 L. R. Ch. D. 637.

<sup>7</sup> *Prehn v. Royal Bank*, *supra*.

<sup>8</sup> *Twibell v. London Suburban Bank*, W. N. (1869), Part I, p. 127.

*Drawee and Holder.*

No privity between drawee and holder.

Art. 210. The drawee of a bill, as such, incurs no liability to the holder, and there is no privity of contract between them.<sup>1</sup>

## ILLUSTRATION.

A., having \$100 at his bankers', draws a check on them for that sum in favor of C. The check is dishonored. C. has no remedy against the bankers.<sup>2</sup>

NOTE.—Similarly, when a bill is accepted payable at a banker's, there is no privity between the drawer or holder and the acceptor's banker.<sup>3</sup> In France, when the drawee has funds, drawing a bill operates as an assignment of them in favor of the holder, and creates a privity between holder and drawee.<sup>4</sup> And it is held in America that where a bill is drawn for the whole of a particular fund, or for the entire indebtedness of drawee to drawer, it operates as an equitable assignment thereof, and binds the fund in drawee's hands after notice of the assignment.<sup>5</sup>

*Explanation.*—Such privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of such agreement.<sup>6</sup>

<sup>1</sup> *Hopkinson v. Forster* (1874), 19 L. R. Eq. 74; *Chapman v. White* (1852), 6 N. Y. 412; *Chase v. Alexander* (1879), 6 Mo. Ap. 505; *Weinstock v. Bellwood* (1876), 12 Bush. (Ky.), 139; *First Nat. Bank v. Dubuque Ry. Co.* (1879), 52 Ia. 378; Cf. *Vaughan v. Halliday* (1874), 9 L. R. Ch. 561; *Exchange Bank v. Rice* (1871), 107 Mass. 37.

<sup>2</sup> *Id.*; *Schroeder v. Bank* (1876), 34 L. T. N. S. 735; *Carr v. Nat. Bank* (1871), 107 Mass. 45; *Bank v. Millard* (1869), 10 Wall. (U. S.) 152; *First Nat. Bank v. Whitman* (1876), 94 U. S. 343; *In re Merrill* (1877), 71 N. Y. 325; Cf. *Griffin v. Kemp* (1874), 46 Ind. at 175. Contra, whether check is for whole or part of deposit, *Roberts v. Corbin* (1868), 26 Ia. 315; *Union Nat. Bank v. Oceana Bank* (1875), 80 Ill. 212; *McGrade v. German Sav. Inst.* (1877), 4 Mo. Ap. 330; *Lester v. Given* (1871), 8 Bush. (Ky.) 357; *Pease v. Landauer* (1885), 63 Wis. 20.

<sup>3</sup> *Hill v. Royds* (1869), 8 L. R. Eq. 290.

<sup>4</sup> *Bravard-Demangeat*, 7th ed. 235; *Nouguier*, § 392-431.

<sup>5</sup> Cf. *Mandeville v. Welch* (1820), 5 Wheat. (U. S.) at 286; *Luff v. Pope* (1843), 5 Hill (N. Y.) 413; *Bank v. Bogy* (1869), 44 Mo. 13; *Gibson v. Cooke* (1838), 20 Pick. (Mass.) 15; Contra, *Shand v. Du Buisson* (1874), L. R. 18. Eq. 283.

<sup>6</sup> *Robey v. Oliver* (1872), 7 L. R. Ch. 695; *Ranken v. Alfaro* (1877), 5 L. R. Ch. D. 786.

## ILLUSTRATIONS.

No privity between drawer and holder.

1. B. gives A. an open letter of credit authorizing him to draw to the extent of \$10,000, and concluding "parties negotiating bills under it are requested to indorse particulars on the back hereof." A. accordingly draws a bill for \$500 in favor of C., who duly indorses the particulars on the credit. B. becomes insolvent, and dishonors the bill on presentment. C. can prove for \$500 against B.'s estate.<sup>1</sup>

2. A. draws a bill on B. in favor of C., and remits funds to meet it. B. does not accept the bill, but he tells C. that he has received the funds and promises to pay the bill. B. does not pay the bill. No action on the bill can be maintained against B., the statute requiring acceptance to be in writing on the bill, but C. can sue B. for money received to his use.<sup>2</sup>

NOTE.—*Letters of Credit*.—A letter of credit, says Story, is "a letter of request whereby one person (usually a merchant or banker) requests some other person to advance moneys or give credit to a third person named therein for a certain amount, and promises that he will repay such sum to the person advancing the same, or accept bills drawn upon himself for the like amount. It is called a general (or open) letter of credit, when it is addressed to all merchants or other persons in general; and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person."<sup>3</sup> See the nature of a letter of credit commented on by Lord Cairns in a case where it was held that a writing opening a credit for a particular sum does not of itself constitute an equitable assignment or specific appropriation of that sum, so as to create a trust. It is an undertaking that the person giving it will act as paymaster to the person to whom it is given, up to a certain amount, on his performing the conditions set forth in it. It is usually operated on by bills of exchange, but it may be operated on by checks, or simple demand of payment.<sup>4</sup> See an open letter of credit, distinguished from an ordinary or special credit by Brett, L. J.<sup>5</sup>

<sup>1</sup> *Re Agra Bank* (1867), 2 L. R. Ch. 391; Cf. *Citizens' Bank v. N. O. Bank* (1873), 6 L. R. H. L. 352.

<sup>2</sup> *Griffin v. Weatherby* (1868), 3 L. R. Q. B. 753.

<sup>3</sup> *Story*, §§ 459, et seq.

<sup>4</sup> *Morgan v. Larivière* (1875), L. R. 7 H. L. at p. 432. And see note to *British Linen Co. v. Caledonian Insurance Co.* (1861), 4 Macq. H. L. at p. 109.

<sup>5</sup> *Union Bank of Canada v. Cole* (1877), 47 L. J. C. P. at p. 109.

*Acceptor and Holder.*

Acceptor's contract with holder.

Art. 211. The drawee of a bill of exchange becomes, by accepting it, the principal debtor thereon.<sup>1</sup> As acceptor he undertakes that he will pay it according to the tenor of his acceptance.<sup>2</sup>

NOTE.—See the primary and absolute liability of an acceptor distinguished from the secondary and contingent liability of a drawer or indorser by Bayley, J.,<sup>3</sup> and Cresswell, J.<sup>4</sup> In the case of a bill accepted for value, the acceptor is frequently described as the principal debtor, and the drawer and indorser as his sureties,<sup>5</sup> but as Lord Blackburn has pointed out, this is not an accurate expression. The drawer or indorser “is not exactly a surety for the acceptor, or co-surety with those who are sureties for the acceptor, yet he stands in a position sufficiently analogous to that of a surety” to entitle him to the equities of a surety, when the bill has been dishonored, though not before.<sup>6</sup> As to the mutual relations of joint acceptors, who are not partners, see per Wilde, C. J.<sup>7</sup> See, also, Arts. 38-40, as to general and qualified acceptances, and Art. 172, as to presentment for payment to charge acceptor.

Acceptor's estoppel.

Art. 212. The acceptor of a bill of exchange by the fact of acceptance conclusively admits and warrants to a *bona fide* holder—

- (1.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw.<sup>8</sup>

<sup>1</sup> *Philpot v. Bryant* (1828), 4 Bing. at 720.

<sup>2</sup> *Smith v. Vertue* (1860), 30 L. J. C. P. 56; see at 60. per Byles, J.; Cf. *Walton v. Mascall* (1844), 13 M. & W. at 458. Purke, B.; Cf. French Code, Art. 121; German Exchange Law, Art. 23.

<sup>3</sup> *Rouse v. Young* (1820), 2 Bligh. H. L. at 467.

<sup>4</sup> *Jones v. Broadhurst* (1850), 9 C. B. at 81.

<sup>5</sup> See, e. g., *Cook v. Lister* (1863), 32 L. J. C. P. at p. 127, per Willes, J.; *Rouquette v. Overmann* (1875), L. R. 10 Q. B. at p. 536, per Cockburn, C. J.

<sup>6</sup> *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. H. L. at p. 19.

<sup>7</sup> *Harmer v. Steele* (1849), 4 Fxch. at 13.

<sup>8</sup> *Cooper v. Meyer* (1830), 10 B. & C. 463; *Nat. Park Bank v. North Bank* (1871), 46 N. Y. 77; Cf. *Allen v. Kramer* (1878), 2 Bradw. (Ill.) 205 (check).

## ILLUSTRATIONS.

Acceptor's estoppel.

1. A bill purporting to be drawn by A. on B. in favor of C. is accepted by B. and then negotiated. B., the acceptor, cannot set up that A.'s signature is a forgery.<sup>1</sup>

2. A bill is drawn by A. on B. in favor of C. C. alters the amount from \$10 to \$100, and then indorses it away. B. subsequently accepts it. B., notwithstanding his acceptance, may set up the alteration as a defense.<sup>2</sup>

NOTE.—But this rule has been materially modified by holding that this admission of the genuineness of the drawer's signature is conclusive (1) only in favor of a holder who is not only *bona fide*, but who has not contributed by his own fault or negligence to the loss or misled the acceptor into the belief that the signature was genuine,<sup>3</sup> and (2) only in favor of a holder who took the bill *after* the acceptance.<sup>4</sup>

A *bona fide* holder for value of a bill of exchange before acceptance is not required to pay an additional consideration to the drawee for his acceptance in order to enforce it against him. The bill itself implies a representation by the drawer that the drawee is in funds to meet it, and the contract of the former is that the latter will accept and pay according to the terms of the bill; the subsequent acceptance constitutes an admission of the truth of the representation which the drawee and acceptor is not thereafter allowed to retract.<sup>5</sup>

(2.) In the case of a bill payable to drawer's order, the *then* capacity of the drawer to indorse,<sup>6</sup>

<sup>1</sup>*Cooper v. Meyer* (1830), 10 B. & C. 468; *Sanderson v. Collman* (1842), 4 M. & Gr. 209; *Goddard v. Bank* (1850), 4 N. Y. 147; *Howard v. Bank* (1876), 28 La. An. 727; Cf. *Orr v. Bank* (1854), 1 Macq. H. L. 513; *Hortsmann v. Henshaw* (1850), 11 How (U. S.), 177; *Peoria R. R. Co. v. Neill* (1855), 16 Ill. 269.

<sup>2</sup>*White v. Cont. Bank* (1876), 64 N. Y. 316; *Bank of Commerce v. Union Bank* (1850), 3 N. Y. 230; *Redington v. Woods* (1873), 45 Cal. 406; Cf. *Buchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Aliter*, if drawer consent to alteration, *Ward v. Allen* (1840), 2 Met. (Mass.) 53.

<sup>3</sup>*Nat. Bank v. Bangs* (1871), 106 Mass. 441; Cf. *Ellis v. Ohio Trust Co.* (1855), 4 O. St. 628.

<sup>4</sup>*McKleroy v. Bank* (1859), 14 La. An. 462.

<sup>5</sup>*Heuertemette v. Morris* (1885), 101 N. Y. 63.

<sup>6</sup>*Braithwaite v. Gardiner* (1846), 8 Q. B. 473 (bankrupt); *Smith v. Marsack* (1848), 18 L. J. C. P. 65 (married woman); *Halifax v. Lyle* (1849), 3 Exch. 464 (corporation not having power to issue bills).



Acceptor's estoppel.

but not the genuineness of his indorsement,<sup>1</sup> or (apparently) his authority to indorse.<sup>2</sup>

NOTE.—The distinction between capacity and authority (Cf. Art. 61) reconciles the cases. It is clear that capacity to draw must coincide with capacity to indorse, this being a question of status; while an authority to draw on behalf of another need not include an authority to indorse. The evidence, of course, may create an estoppel where the acceptance does not (Cf. Arts. 81, 139). When the drawer of a bill payable to drawer's order is a fictitious person, it was said in some of the cases that the acceptor undertook to pay to an indorsement in the same handwriting as the drawer's signature;<sup>3</sup> but in other cases, it was said that the bill might be treated as payable to bearer.<sup>4</sup>

(3.) (Probably) in the case of a bill payable to a third person, the existence of the payee and his *then* capacity to indorse,<sup>5</sup> though not the genuineness of his indorsement.<sup>6</sup>

NOTE.—But if the forged indorsement was on the bill when issued by the drawer, the acceptor cannot set up the forgery in defense to the suit of a *bona fide* holder, since the forgery is the drawer's own act, and the acceptor is entitled to charge him with the payment of the bill.<sup>7</sup> The point as to the admission of payee's capacity has not arisen fairly. The maker of a note warrants the then capacity of the payee, but maker and payee are immediate parties, while acceptor and payee are not. The acceptor, of course, may be estopped by the evidence: see Art. 139 as to fictitious payee; see, also, Art. 81 for cases where a man may be precluded from saying that a false signature is not his own.

<sup>1</sup> *Beeman v. Duck* (1843), 11 M. & W. 251; *Canal Bank v. Bank* (1841), 1 Hill (N. Y.), 287; Cf. *Smith v. Chester* (1787), 1 T. R. 654, and *passim*. *Roberts v. Tucker* (1851), 16 Q. B. 560.

<sup>2</sup> *Robinson v. Yarrow* (1817), 7 Taunt. 455 (bill drawn and indorsed "per proc." without authority); *Garland v. Jacomb* (1873), 8 L. R. Ex. 216, Ex. Ch. (bill drawn and indorsed by partner in non-trading firm without authority).

<sup>3</sup> *Cooper v. Meyer* (1830), 10 B. & C. 468; *London & S. W. Bank v. Wentworth* (1880), L. R. 5 Ex. D. 96.

<sup>4</sup> *Beeman v. Duck* (1843), 11 M. & W. at 256; Cf. *Phillips v. Im Thurn* (1866), 1 L. R. C. P. at 471.

<sup>5</sup> *Byles*, p. 202; *Daniel*, § 536; Cf. *Drayton v. Dale* (1823), 2 B. & C. 293 at 299.

<sup>6</sup> *Holt v. Ross* (1873), 54 N. Y. 472; Cf. *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.

<sup>7</sup> *Hortsmann v. Henshaw* (1850), 11 How (U. S.), 177.

Art. 213. The acceptor of a bill of exchange who dishonors it is liable for—

Damages  
against ac-  
ceptor.

- (1.) The amount of the bill with interest (*a*) from the maturity thereof if the bill be payable on a day certain,<sup>1</sup> or (*b*) from the time of presentment for payment if the bill be payable on demand.<sup>2</sup>

*Explanation.*—Interest in the nature of damages may, if justice require it, be withheld wholly or in part,<sup>3</sup> and when a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.<sup>4</sup>

NOTE.—While the American authorities do not directly deny this doctrine, yet many cases hold that the holder is entitled to recover interest after maturity at the rate expressed in the bill, apparently on the ground that it is a part of the contract of the parties.<sup>5</sup> Other cases hold that he is entitled to recover only legal interest at place of suit,<sup>6</sup> whether it be more or less than the rate specified.<sup>7</sup> As to interest proper see Art. 13, Expl. 4. The bill must be produced at the trial to entitle the plaintiff to

<sup>1</sup> *Lithgo v. Lyon* (1805), Coop. Ch. Ca. 29; *Lving v. Stone* (1828), 2 M. & Ry. 562; Cf. *Ayer v. Tilden* (1860), 15 Gray (Mass.), at 183.

<sup>2</sup> *Re East of Eng. Banking Co.* (1868), 4 L. R. Ch. 14; *Patrick v. Clay* (1815), 4 Bibb (Ky.), 246; Cf. *Renss Factory v. Reid* (1825), 6 Cow. (N. Y.) 589. But see *Pullen v. Chase* (1841), 4 Ark. 210 (from date).

<sup>3</sup> *Laing v. Stone*, (1828), 2 M. & Ry. 562; see, also *e. g.*, *Dent v. Dunn* (1812), 3 Camp. 296, (tender); *Murray v. East India Co.* (1821), 5 B. & Ald. 204, (holder dead and payment not demanded); *Phillips v. Franklin* (1828), Gow. 196, (bill payable specially, no demand at place of payment proved); Cf. *Bann v. Dalzell* (1828), M. & M. 228; *Ayer v. Tilden*, (1860), 15 Gray (Mass.), at 183; *Owsley v. Greenwood* (1872), 18 Minn. 429. But Cf. *Brannon v. Hursell* (1873), 112 Mass. at 71.

<sup>4</sup> *Keene v. Keene* (1857), 27 L. J. C. P. 88; *Webster v. British Empire Co.* (1880), 15 Ch. D. at pp. 175, 176; see *Ward v. Morrison* (1842), Car. & M. 268 (rate reduced).

<sup>5</sup> *Cromwell v. Co. of Sac* (1877), 98 U. S. 51, explaining *Brewster v. Wakefield* (1859), 22 How. (U. S.) 118; *Brannon v. Hursell* (1873), 112 Mass. 63; *Monnett v. Sturges* (1874), 25 O. St. 384; *Kohler v. Smith* (1852), 2 Cal. 597; *Pruyn v. Milwaukee* (1864), 18 Wis. 367.

<sup>6</sup> *Ayer v. Tilden* (1860), 15 Gray (Mass.), 178.

<sup>7</sup> *Eaton v. Boissonault* (1877), 67 Me. 540; *Moreland v. Lawrence* (1876), 23 Minn. 84; *Newton v. Kinnerly* (1876), 31 Ark. 622.

Damages  
against ac-  
ceptor.

interest before writ.<sup>1</sup> By French Code, Art. 184, interest runs against all parties from the day of protest for non-payment.

- (2.) As special damage, the notarial expenses consequent on dishonor,<sup>2</sup> and (perhaps) the loss on re-exchange incurred by an indorser who has taken up or paid the bill.<sup>3</sup>

NOTE.—The decisions might be reconciled by holding that the acceptor, as such, is not liable to the holder for re-exchange, but that he is liable to the drawer for re-exchange by reason of the special contract between drawer and drawee, see Art. 209; but perhaps the older cases would now be overruled if the point was raised directly.

Conflict of laws  
as to damage.

Art. 214. When laws conflict the measure of damage against the acceptor is determined by the law of the place of payment.

#### ILLUSTRATION.

A bill drawn and accepted in France is by the acceptance made payable in London. Damages against the acceptor are to be assessed according to English law.<sup>4</sup>

#### *Drawer or Indorser and Holder.*

General liability  
of drawer.

Art. 215. The drawer of a bill of exchange en-

<sup>1</sup> *Hutton v. Ward* (1850), 15 Q. B. 26.

<sup>2</sup> *Ticknor v. Branch Bank* (1841), 3 Ala. 135; *Bowen v. Stoddard* (1845), 10 Met. (Mass.), 375; Cf. *Kendrick v. Lomax* (1832), 2 Cr. & J. 404, (noting and postage). *Aliter*, if no drawer or indorser whom protest is necessary to charge. *German v. Ritchie* (1872), 9 Kans. 106; *Cramer v. Eagle Mfg. Co.* (1880), 23 Kan. 399.

<sup>3</sup> *Re Gillespie* (1886), 16 Q. B. D. 702; *aff'd*, 18 Q. B. D. 286. C. A.; *Re General S. A. Co.* (1877), 7 L. R. Ch. D. 637, see at 644: *Riggs v. Lindsay* (1813), 7 Cranch (C. Ct.), 500; Cf. *Bowen v. Stoddard* (1845), 10 Met. (Mass.) 375, at 379; *Pothier*, No. 117; *Story*, § 398. *Contra*, *Nopier v. Schneider* (1810), 12 East, 420; *Woolsey v. Crawford* (1810), 2 Camp. 445; *Dawson v. Morgan* (1829), 9 B. & C. at 620; *Watt v. Riddle* (1839), 8 Watts (Pa.), 545; *Byles*, p. 420.

<sup>4</sup> *Cooper v. Waldegrave* (1840), 2 Beav. 282; *Frazier v. Warfield* (1848), 9 Sm. & M. 220; *Campbell v. Nichols* (1868), 33 N. J. L. 81; *Watt v. Riddle* (1839), 8 Watts (Pa.), 545. But see *Ayer v. Tilden* (1860), 15 Gray (Mass.), 178.

gages that on due presentment it shall be accepted and paid according to its tenor, and that if it be not so accepted and paid he will indemnify the holder, provided due notice of dishonor be given.

General liability of drawer.

NOTE.—By statute in England, the drawer and indorsers of a bill are jointly and severally responsible to the holder for the due acceptance and payment thereof,<sup>1</sup> and similar statutes allowing an action against all the parties jointly, have been passed in many States. See the liabilities of the drawer stated in general terms by Lord Lyndhurst,<sup>2</sup> Parke, B.,<sup>3</sup> Lord Kingsdown,<sup>4</sup> Cresswell, J.,<sup>5</sup> and Alderson, B.<sup>6</sup> The liability of the drawer of an accepted bill must in general be measured by that of the acceptor, their relations being those of principal and surety.<sup>7</sup>

Art. 216. The drawer of a bill of exchange payable to the order of another person, by the fact of drawing it, conclusively admits and warrants to a *bona fide* holder the existence of the payee and his *then* capacity to indorse.<sup>8</sup>

Drawer's capacity.

Art. 217. Any person who signs a negotiable bill otherwise than as drawer or acceptor, *prima facie* incurs the liability of an indorser. Cf. Arts. 111, 112.

Who liable as indorser.

*Exception.*—Indorsement by way of receipt.<sup>9</sup>

#### ILLUSTRATIONS.

1. D. is the holder of a bill already indorsed in blank, and therefore negotiable by mere delivery. He indorses it to E. D. thereby incurs the liabilities of an indorser.<sup>10</sup>

<sup>1</sup> Cf. 18 & 19 Vict. c. 67, § 6; *Rouquette v. Oerman* (1875), 10 L. R. Q. B. at 537; French Code, Art. 118; German Exchange Law, Arts. 8, 49.

<sup>2</sup> *Siggers v. Lewis* (1884), 1 C. M. & R. at 371, cause of action.

<sup>3</sup> *Whitehead v. Walker* (1842), 9 M. & W. at 516, non-acceptance.

<sup>4</sup> *Allen v. Kemble* (1848), 6 Moore P. C. at 321, *compensatio*.

<sup>5</sup> *Jones v. Broadhurst* (1850), 9 C. B. at 181, payment.

<sup>6</sup> *Gibbs v. Fremont* (1853), 9 Exch. at 30, damages.

<sup>7</sup> *Rouquette v. Oerman*, *supra*, at 537; but Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378, for an exception.

<sup>8</sup> *Collis v. Emmet* (1791), 1 H. Bl. 313; Cf. *Phillips v. Im Thurn* (1865), 18 C. B. N. S. 694. see at 701; Cf. Arts. 139 and 287.

<sup>9</sup> *Clark v. Whiting* (1877), 45 Conn. 149; Cf. *Keene v. Beard* (1860), 8 C. B. N. S. at 382, Byles, J.

<sup>10</sup> Cf. *Fairclough v. Pavia* (1850), 9 Exch. at 695, and Arts. 109, 119.

Who liable as  
indorser.

2. B. makes a note payable to C. or order. After it is issued D., to accommodate the maker, signs his name on the face of the note. D. is liable as an indorser.<sup>1</sup>

3. B. and C. are indebted to A. A. draws a bill for the amount on B., payable to his own order, and indorses it in blank. B. accepts the bill. C. also writes his name on the face of the instrument.<sup>2</sup> If B. does not pay it, C. may be sued as indorser.<sup>3</sup>

4. A bill is drawn payable to drawer's order and accepted. C. afterwards backs it with his signature. C. is liable as indorser to subsequent parties, but parol evidence is not admissible to show that C. intended to be liable to the drawer in case the bill was dishonored. Such an agreement must be in writing to satisfy the statute of frauds.<sup>4</sup>

5. The drawer of a bill indorses it to C., who has undertaken to be answerable for the price of goods supplied to the acceptor. C. then indorses the bill back to the drawer. The drawer, in his character of indorsee, can sue C. as indorser.<sup>5</sup>

NOTE.—What is the liability of a person who indorses in blank a bill or note payable to order (Cf. Illust. 3, *supra*.) at a time when he is not the payee or holder? He is not strictly an indorser, but he is called a quasi-indorser, and his act an irregular or anomalous indorsement. Without attempting to give the exact shades of difference which divide the American courts on the question of his liability, the two leading views may be thus stated in brief: (1) In a few of the States he *prima facie* incurs the liability of an indorser, but parol evidence is admissible of the intention of the parties, which, when ascertained, determines his liability.<sup>6</sup> (2) But, by the

<sup>1</sup> *Ex parte Yates* (1858), 2 DeG. & J. 191; Cf. *Guinnell v. Herbert* (1836), 6 N. & M. 723. But see next note.

<sup>2</sup> *Young v. Glover* (1857), 3 Jur. N. S. 637, Q. B.; Cf. *Jackson v. Hudson* (1810), 2 Camp. 447; *Bigelow v. Colton* (1859), 13 Gray (Mass.), 509; *Dubois v. Mason* (1879), 127 Mass. 37; *Roberts v. Masters* (1872), 40 Ind. 462; *Camden v. McKoy* (1842), 3 Scam. (Ill.) 437; *Thacher v. Stevens* (1879), 46 Conn. 561.

<sup>3</sup> *Steele v. McKinlay* (1880), 5 App. Cas. 754, H. L.; overruling, it seems, *Matthews v. Bloxsome* (1864), 33 L. J. Q. B. 209; Cf. *Foster v. Mackinnon* (1869), 4 L. R. C. P. at 712, and Art. 23.

<sup>4</sup> *Wilkinson v. Unwin* (1881), 7 Q. B. D. 636, C. A.; distinguishing *Steele v. McKinlay*, *supra*.

<sup>5</sup> *Coulter v. Richmond* (1875), 59 N. Y. 478; *Jaffray v. Brown* (1878), 74 N. Y. 393; *Browning v. Merritt* (1878), 61 Ind. 425; *Cady v. Shepard* (1860), 12 Wis. 639; *Fear v. Dunlap* (1848), 1 G. Greene (la.), 331; *Eilbert v. Finkbeiner* (1871), 68 Pa. St. 243.

weight of authority, he is liable as a joint promisor or co-maker if he indorsed the note before it was issued, and it is so presumed; but, if shown to have indorsed it after its issue, he is liable as guarantor; but in both cases evidence is admissible of the real intention of the parties, which, when ascertained, determines his liability.<sup>1</sup> Some courts, however, hold evidence inadmissible to vary the contract thus implied by law.<sup>2</sup> It would not (perhaps) be admissible against a remote party.<sup>3</sup> A few courts hold that the quasi-indorser *prima facie* incurs the liability of a guarantor,<sup>4</sup> while others hold that the law implies no contract whatever from such an indorsement.<sup>5</sup> The liabilities of the indorser of a non-negotiable bill or note are not clear. By some authorities he is absolutely liable as maker or guarantor, and not entitled to notice of dishonor,<sup>6</sup> but by others, he is held liable as indorser.<sup>7</sup> As to indorser of over-due bill, see Art. 201, n.

It is to be noted that if two or more persons indorse a bill or note, to accommodate the acceptor or maker, their relations *inter se* are those of co-sureties, and not of sureties in succession according to the order of their names on the bill.<sup>8</sup>

Art. 218. The indorser of a bill is in the nature of a new drawer.<sup>9</sup> Cf. Art. 215.

<sup>1</sup> *Union Bank v. Willis* (1844), 8 Met. (Mass.) 504; *Good v. Martin* (1877), 95 U. S. 90; *Hayden v. Weldon* (1881), 14 Vroom (N. J.), 128; *Carpenter v. McLaughlin* (1879), 12 R. I. 270; *Stein v. Passmore* (1878), 25 Minn. 256; *Herbage v. McEntee* (1879), 40 Mich. 337; *Chafre v. R. R.* (1876), 64 Mo. 193; Cf. *Sylvester v. Downer* (1843), 20 Vt. 355. *prima facie* maker in all cases; *Rivers v. Thomas* (1878), 1 Lea (Tenn.), 649, indorser if signed before issue.

<sup>2</sup> *Allen v. Brown* (1878), 124 Mass. 77.

<sup>3</sup> *Schneider v. Schiffman* (1855), 20 Me. 571; Cf. *Hoffman v. Moore* (1880), 82 N. C. 313; *Houston v. Bruner* (1872), 39 Ind. 376. But see *Good v. Martin* (1877), 95 U. S. 90; *Greenough v. Smead* (1854), 3 O. St. 415.

<sup>4</sup> *Boynton v. Pierce* (1875), 79 Ill. 145; *Stowell v. Raymond* (1876), 83 Ill. 120; *Harding v. Heirs of Waters* (1880), 6 B. J. Lea (Tenn.), 324; *Seymour v. Mickey* (1864), 15 O. St. at 519; Cf. *Hooks v. Anderson* (1877), 58 Ala. 238; *Jones v. Goodwin* (1876), 39 Cal. 493; *Gillespie v. Wheeler* (1878), 46 Conn. 410.

<sup>5</sup> *Chaddock v. Vanness* (1871), 33 N. J. L. 517.

<sup>6</sup> *Cronwell v. Hewitt* (1869), 40 N. Y. 491 (reviewing cases); *McMullen v. Rafferty* (1882), 89 N. Y. 456; *Paine v. Noelke* (1877), 53 How. Pr. (N. Y.) 273; *Sweetser v. French* (1848), 2 Cush. (Mass.) 309; *Houghton v. Ely* (1870), 26 Wis. 181; *Billingham v. Bryan* (1860), 10 Ia. 317; *Plimley v. Westley* (1835), 2 Bing. N. C. 249; Cf. *Gwynnell v. Herbert* (1836), 6 N. & M. at 726; *Jackson v. Slipper* (1869), 19 L. T. N. S. 640.

<sup>7</sup> *Parker v. Riddle* (1841), 11 O. 102; Cf. *Raymond v. Middleton* (1838), 29 Pa. St. at 532, 533.

<sup>8</sup> *Macdonald v. Whitfield* (1883), 8 App. Cas., 733, P. C.

<sup>9</sup> *Penny v. Innes* (1834), 1 C. M. & R. at 441, Parke, B.; *Steele v. McKinlay* (1880), 5 App. Cas. at pp. 767, 768, per Ld. Blackburn; An-

General liability of indorser.

He engages that on due presentment it shall be accepted and paid according to its (then?) tenor, and that if it be not so accepted and paid he will indemnify the holder, provided due notice of dishonor be given.<sup>1</sup>

NOTE.—Is the indorser a new drawer of the same bill or a similar bill? The point has not fairly arisen. Lush, J., regards him as a new drawer of the same bill;<sup>2</sup> but Alderson, B., regards the point as doubtful.<sup>3</sup> See, too, Art. 60. For instance, a bill drawn in France is indorsed in England. Are damages to be assessed according to English or French Law? Again, a bill which has been accepted conditionally is subsequently indorsed. Is the indorser liable according to the tenor of the bill or of the acceptance?

Indorser's estoppel.

Art. 219. The indorser of a bill, by the fact of indorsing it, conclusively admits and warrants to a *bona fide* holder<sup>4</sup> the genuineness and regularity in all respects of the drawer's signature and all previous indorsements,<sup>5</sup> that the bill is a valid and subsisting bill, and that he has a good title thereto.<sup>6</sup>

NOTE.—It has recently been held that an accommodation indorser, known to be such, does not warrant to his indorsee the genuineness of the body of the draft, and cannot be held liable

*dreus v. Simms* (1878), 33 Ark. 771; *Aymar v. Sheldon* (1834) 12 Wend. at 443; *Sinker v. Fletcher* (1878), 61 Ind. 276.

<sup>1</sup> *Suse v. Pompe* (1860), 30 L. J. C. P. at 78, Byles, J.; *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1 at p. 18, per L. J. Blackburn; *First Nat. Bank v. Marine Bank* (1873), 20 Minn. 63; German Exchange Law, Art. 14.

<sup>2</sup> Cf. *Lebel v. Tucker* (1867), 3 L. R. Q. B. at 81. But see *Andrews v. Simms*, (1878), 33 Ark. 771.

<sup>3</sup> *Gibbs v. Fremont* (1853), 9 Exch. at 31.

<sup>4</sup> *Turner v. Keller* (1876), 66 N. Y. 68.

<sup>5</sup> *Ex parte Clarke* (1792), 8 Brown C. C. 238; *Thicknesse v. Bromilow* (1832), 2 Cr. & J. 425; *McGregor v. Rhodes* (1856), 6 E. & B. 266; *State Bank v. Fearing* (1835), 16 Pick. (Mass.) 533; *Condon v. Pearce* (1875), 43 Md. 83; *Williams v. Inst.* (1880), 57 Miss. 633; though indorsed *sans recours*, *Dumont v. Williamson* (1869), O. St. 515; *Watson v. Chesire* (1865), 18 Ia. 202.

<sup>6</sup> *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Burrill v. Smith* (1828), 7 Pick. (Mass.) 291; *Prescott Bank v. Caverly* (1856), 7 Gray (Mass.), 217; *Dalrymple v. Hillenbrand* (1875), 62 N. Y. 5.

because the amount had been previously altered without his indorser's knowledge.<sup>1</sup> Indorser's estoppel

By the British Code, § 55, (2), (c) an indorser is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

If the holder sue C., an indorser, it is no defense to show that the drawer's or acceptor's signature has been forged, or that the amount of the bill was altered after issue and before indorsement. C.'s contract of indorsement is distinct and independent, and he cannot set up the invalidity of the bill at the time of his transfer against any subsequent holder.<sup>2</sup> But in England this rule is subject to the operation of the stamp laws by which a material alteration of a bill after issue makes it a new instrument requiring a fresh stamp.<sup>3</sup> See Arts. 246, n., and 248.

Art. 220. The drawer or indorser of a dishonored bill is liable for damages at the following rates:— Damages against drawer or indorser.

(1.) *Inland bill.* The amount of the bill with interest<sup>4</sup> from (probably) the time of dishonor.<sup>5</sup>

*Explanation.*—Interest in the nature of damages may, if justice require it, be withheld wholly or in part;<sup>6</sup> and when a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.<sup>7</sup>

NOTE.—In one case it was said that interest as damages could only be recovered from the drawer or indorser from the time when he received notice of dishonor.<sup>8</sup> But the case must be regarded as one where the jury under the circumstances exercised their discretion and withheld interest. When a bill is

<sup>1</sup> *Susquehanna Valley Bank v. Loomis* (1881), 85 N. Y. 207.

<sup>2</sup> Cf. *Andrews v. Simms* (1878), 33 Ark. 771, and cases cited; *Washington Bank v. Ecky* (1873), 51 Mo. 272; *Morford v. Davis* (1864), 23 N. Y. 481; *Ballingalls v. Gloster* (1808), 3 East, at 482, Ellenborough, C. J.

<sup>3</sup> *Knill v. Williams* (1809), 10 East, 431; Cf. *Suffell v. Bank of England* (1882), 9 Q. B. D. at 574.

<sup>4</sup> *Windle v. Andrews* (1819), 2 B. & Ald. 696.

<sup>5</sup> *Keene v. Keene* (1857), 3 C. B. N. S. 144; Cf. Art. 213, and *Ackerman v. Ehrensperger* (1846), 16 M. & W. at 108.

<sup>6</sup> *Laing v. Stone* (1828), 2 M. & Ry. 562, and Art. 113.

<sup>7</sup> *Keene v. Keene* (1857), 3 C. B. N. S. 144, and Art. 213, n.

<sup>8</sup> *Walker v. Barnes* (1813), 5 Taunt. 240; but cf. *Siggers v. Lewis* (1834), 1 C. M. & R. 370.



**Damages against drawer or indorser.** dishonored by non-acceptance, it would seem on principle that interest should only be allowed from its maturity, but the practice appears to be otherwise.<sup>1</sup> By French Code, Art. 184, interest accrues from the day of protest for non-payment, and by German Exchange Law, Art. 50, from the day of non-payment.

(2) *Foreign bill of exchange.* The amount of the bill with interest from the time of dishonor, and the notarial expenses, or if it be payable abroad, the re-exchange, interest and expenses.<sup>2</sup>

**Re-exchange and re-draft.**

Art. 221. "Re-exchange" means the loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed.<sup>3</sup>

The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the then rate of exchange on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor.<sup>4</sup>

The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a "Re-draft." The

<sup>1</sup> *Harrison v. Dickson* (1811), 2 Camp. 52, n.; Cf. *Suse v. Pompe* (1860), 8 C. B. N. S. at 566, re-exchange on non-acceptance. But see *Crawford v. Bank* (1844), 6 Ala. at 15.

<sup>2</sup> *Mellish v. Simeon* (1794), 2 H. Bl. 377, cumulative re-exchange against drawer; *Suse v. Pompe* (1860), 8 C. B. N. S. 538; see at 566, 567; Cf. *Adams v. Cordis* (1829), 8 Pick. (Mass.) at 265; *Bank of U. S. v. U. S.* (1844), 2 How. (U. S.) 711; *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. 133 at 146; *Trammell v. Henderson* (1876), 56 Ala. 235; French Code, Arts. 177-186; German Exchange Law, Arts. 50-54.

<sup>3</sup> Cf. *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. at 146, P. C.

<sup>4</sup> *DeTastet v. Baring* (1809), 11 East. at 269; *Suse v. Pompe* (1860), 8 C. B. N. S. at 566-567; Cf. *Bank of U. S. v. U. S.* (1844), 2 How. (U. S.), at 737; German Exchange Law, Art. 50.

indorser who pays a re-draft may in like manner <sup>Re-exchange and re-draft</sup> draw upon an antecedent party.<sup>1</sup>

## ILLUSTRATION.

A. in England, draws a bill for 100*l.* on B., in Calcutta, payable there at a rate of exchange indorsed thereon. This entitles the holder to receive (say) Rupees 1000. The bill is dishonored and the expenses of protest, etc., come to Rs. 10. The holder is then entitled to Rs. 1010 in Calcutta. At the time of dishonor sight bills on England are at 5 p. c. discount. Accordingly a sight bill on England for 106*l.* 1*s.* 0*d.*, would realize in Calcutta Rs. 1010. The holder may either draw a sight bill on A. for 106*l.* 1*s.* 0*d.*, and thus recoup himself, or he may sue A. in England for 105*l.* and interest, and 1*l.* 1*s.* 0*d.* expenses.

*Explanation.*—A custom according to which the holder may recover either the sum he gave for the bill or the re-exchange at his option is invalid,<sup>2</sup> but a custom according to which a fixed rate of damages is substituted for re-exchange, is (perhaps) valid.<sup>3</sup>

NOTE.—The term re-exchange is used to signify (1) the amount of a re-draft, (2) the loss on a particular transaction occasioned by the exchange being adverse, (3) the course of exchange itself, or (4) the right to the sum which would be secured by a re-draft; so the context must always be looked to. In the American states, the amount of damages recoverable against a drawer or indorser is very generally fixed by statute at a definite sum in lieu of re-exchange, etc. When our law governs, the right to re-exchange arises on dishonor by non-acceptance, as well as on non-payment.<sup>4</sup> Under the continental codes it only arises on dishonor by non-payment. For the reason see Art. 157, n. See the subject of re-exchange carefully worked out, German Exchange Law, Arts. 49–54; French Code, Arts. 177–186; *Nouguier*, §§ 1336–1366.

<sup>1</sup> Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Suse v. Pompe*, (1860), 8 C. B. N. S. 538, at 565; French Code, Art. 78; German Exchange Law, Art. 53.

<sup>2</sup> *Suse v. Pompe* (1860), 8 C. B. N. S. 538.

<sup>3</sup> *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. at 144 P. C.; *Grimshaw v. Bender* (1809), 6 Mass. 162; *Hendricks v. Franklin* (1809), 4 Johns. (N. Y.) 119.

<sup>4</sup> Cf. *Suse v. Pompe* (1860), 8 C. B. N. S. at 566.

Conflict of laws  
as to damages.

Art. 222. When laws conflict, the measure of damages against the drawer is determined by the law of the place where the bill was drawn,<sup>1</sup> and against an indorser (probably) by the law of the place where he indorsed the bill.<sup>2</sup>

### *Transferor by Delivery and Transferee.*

Transferor by  
delivery de-  
fined.

Art. 223. The holder of a bill made or become payable to bearer, who negotiates it by delivery without indorsement, is called a "transferor by delivery."

NOTE.—Cf. Art. 106, negotiation defined; Art. 107, what bills are payable to bearer, and Art. 104, transfer of bill payable to order without indorsement. When a bill is transferred by delivery absolutely, the transaction is frequently spoken of as a sale of the bill. See the two meanings of the term "sale of a bill," pointed out Art. 83, n.

Transferor not  
liable on in-  
strument.

Art. 224. A transferor by delivery incurs no liability on the instrument.<sup>3</sup>

Liability on  
consideration.

Art. 225. A transferor by delivery is not liable on the consideration in respect of which he has transferred the bill, if the bill be dishonored.<sup>4</sup>

*Exception 1.*—Bill given in respect of an antecedent debt.<sup>5</sup>

<sup>1</sup> *Gibbs v. Fremont* (1853), 9 Exch. 25; *Re State Fire Ins. Co* (1863), 82 L. J. Ch. 300; *Freese v. Brownell* (1871), 35 N. J. L. 285; *Crawford v. Bank* (1844), 6 Ala. 12.

<sup>2</sup> Cf. *Allen v. Kemble* (1848), 6 Moore P. C. at 321; *Gibbs v. Fremont*, *supra*, at 30, and Art. 60; *Aymar v. Sheldon* (1834), 12 Wend. at 443.

<sup>3</sup> *Ex parte Roberts* (1789), 2 Cox. 171; *Fenn v. Harrison* (1790), 3 T. R. 757; Cf. *Ex parte Isbester* (1810), 1 Rose, 21; *Roberts v. Haskell* (1858), 20 Ill. at 63.

<sup>4</sup> *Read v. Hutchinson* (1813), 3 Camp. 352; *Van Wart v. Wolley* (1824), 3 B. & C. at 445, Abbott, C. J.; *Evans v. Whyte* (1829), 5 Bing. 45; *Noel v. Murray* (1852), 1 Duer (N. Y.), 385; *Youngs v. Siachelin* (1806), 84 N. Y. 258.

<sup>5</sup> *Ward v. Evans* (1703), 2 Ld. Raym. at 930; *Gibson v. Toby* (1869), 53 Barb. (N. Y.) 191; Cf. *Camidge v. Allenby* (1827), 6 B. & C. at 382;

*Exception 2.*—A transferor by delivery is liable on the consideration to his immediate transferee when it appears that the transfer was not intended to operate in full and complete discharge of such liability.<sup>1</sup> Liability on consideration.

*Explanation.*—The transferee in order to avail himself of the above exceptions must use reasonable diligence in endeavoring to obtain payment, and in giving notice of dishonor or repudiating the transaction.<sup>2</sup>

#### ILLUSTRATIONS.

1. D., the holder of a bill for \$100 which has been indorsed in blank, discounts it with a banker for \$90, without indorsing it. The bill is dishonored. D. is not liable to refund the \$90.<sup>3</sup>

2. D. changes a banker's note or cashes a check payable to bearer for the convenience of the holder. If the bank has stopped payment, or the check is dishonored, D. can recover the money.<sup>4</sup>

Art. 226. A transferor by delivery, whether liable on the consideration or not, warrants to his immediate transferee that the bill is what it purports to be,<sup>5</sup> and Warranty of transferor.

*Noel v. Murray*, (1852) 1 Duer (N. Y.) 385; S. C., 3 Kern. (N. Y.), 167; *Downey v. Hicks* (1852), 14 How. (U. S.) at 249; *Derlin v. Chamblin* (1861), 6 Minn. 468; *Bicknall v. Waterman* (1857), 5 R. I. at 48. But *qu.* if this exception now applies to bank notes, *Guardians of Litchfield v. Greene* (1857), 26 L. J. Ex. at 142; *Bayard v. Shunk* (1841), 1 W. & S. (Pa.) 92.

<sup>1</sup> *Van Wart v. Wolley* (1824), 3 B. & C. at 446; *Munroe v. Hoff* (1848), 5 Den. (N. Y.) 360; Cf. *Breed v. Cook* (1813), 15 Johns. (N. Y.) 24.

<sup>2</sup> *Rogers v. Langford* (1833), 1 Cr. & M. 642; *Moule v. Brown* (1838), 4 Bing. N. C. 266; *Robson v. Oliver* (1847), 10 Q. B. 704; Cf. *Gibson v. Toby* (1869), 53 Barb. (N. Y.) 191; Cr. Art. 174. But see *Kephart v. Butcher* (1864), 17 Ia. 240 (injury to transferor the criterion).

<sup>3</sup> *Bank of England v. Newman* (1700), 1 Ld. Raym. 442.

<sup>4</sup> *Turner v. Stones* (1843), 1 D. & L. 122, note; *Woodland v. Fear* (1857), 26 L. J. Q. B. 202; Cf. *Timmins v. Gibbins* (1852), 18 Q. B. 722, notes paid into a bank and credited to customer. See note, *infra*.

<sup>5</sup> *Gompertz v. Bartlett* (1853), 23 L. J. Ex. 65; *Challis v. McCrum* (1879), 22 Kans. 157; *Ledwich v. McKim* (1873), 53 N. Y. 307; *Bell v. Dagg* (1875), 60 N. Y. 528; *Giffert v. West* (1875), 37 Wis. 115; *Beil v. Cofferty* (1863), 21 Ind. 411.

Warranty of  
transferor.

that at the time of transfer he is not aware of any fact which renders it valueless.<sup>1</sup>

#### ILLUSTRATIONS.

1. C. discounts with D. a bill payable to bearer without indorsing it. It turns out that, unknown to C., the amount of the bill had been fraudulently altered by a previous holder. D. can recover from C. the money he paid.<sup>2</sup>

2. D., the *bona fide* holder of a bill purporting to be drawn by A., accepted by B., and indorsed in blank by C., discounts it with a banker. It turns out that the signatures of A. and B. were forgeries, and that C., whose indorsement was genuine, is insolvent. The banker can recover the money he paid from D.<sup>3</sup>

3. D., the holder of a note payable to bearer, discounts it with E. The maker defeats the suit of E. on the ground that the note was usurious and void by statute. E. cannot recover the money he paid from D., unless the latter knew of the usury when he transferred the note.<sup>4</sup>

*Explanation.*—When the transferee discovers the defect in the bill, he must repudiate the transaction with reasonable diligence.<sup>5</sup>

NOTE.—There is some confusion in the cases owing to the distinction between the warranty of genuineness and the liability on the consideration having been lost sight of. The warranty of genuineness is an incident of the contract of sale, and it is immaterial whether the thing sold be a bill or any other personal chattel. The transferor is for this purpose an ordinary vendor.<sup>6</sup> But it is held in a few states that there is no implied warranty of genuineness if the bill is *bona fide sold* as a chattel

<sup>1</sup> Cf. *Fenn v. Harrison* (1790), 3 T. R. at 769; *Camidge v. Allenby* (1827), 6 B. & C. at 382; *Lobdell v. Baker* (1842), 3 Met. (Mass.) 469; *Dunbar Bank v. Jerris* (1859), 20 N. Y. 228; *Bridge v. Batchelder* (1864), 9 Allen (Mass.), 394.

<sup>2</sup> *Jones v. Ryde* (1814), 5 Taunt. 488.

<sup>3</sup> *Gurney v. Womersley* (1854), 24 L. J. Q. B. 46; *Merriam v. Wolcott* (1861), 3 Allen (Mass.), 258.

<sup>4</sup> *Littaner v. Goldman* (1878), 72 N. Y. 506.

<sup>5</sup> *Pooley v. Browne* (1862), 31 L. J. Q. B. 134; *Magee v. Carmack* (1851), 13 Ill. 289; *Frontier Bank v. Morse* (1842), 22 Me. 88.

<sup>6</sup> Cf. *Benjamin on Sales*, 2nd. ed. pp. 332, 493.

and not given in payment of a precedent or present indebtedness.<sup>1</sup> By the weight of authority in America the transferor of a note warrants the solvency of the maker at the time of transfer.<sup>2</sup> It is probably otherwise in England.<sup>3</sup> *Story on Notes*, § 118, says the transferor also warrants his title to the bill. This probably is so; but the question could hardly arise except in the case of an overdue bill. Cf. Arts. 134 and 137.

### *Acceptor Supra Protest and Holder, etc.*

Art. 227. The acceptor *supra protest* engages that he will on presentment pay the bill according to the tenor of his acceptance if it be not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he has notice of these facts.<sup>4</sup>

The acceptor *supra protest* is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.<sup>5</sup>

NOTE.—If the bill be not presented in due time to the acceptor for honor, it is conceived that he, and any party who would have been discharged if he had paid the bill, are discharged by the holder's laches, but there is no decision in point.<sup>6</sup> Under French Code, Art. 127, and German Exchange Law, Art. 58, an acceptor *supra protest* is bound to give notice of his acceptance to the person for whose honor he has accepted. The rights of the acceptor for honor arise on payment. Under German Exchange Law, Art. 65, however, an acceptor for honor who is not called on to pay the bill is nevertheless entitled to a commission of one-third per cent.

<sup>1</sup> *Baxter v. Duren* (1849), 29 Me. 434, but Cf. *Hussey v. Sibley* (1877), 66 Me. at 196; *Fisher v. Rieman* (1858), 12 Md. 497.

<sup>2</sup> *Ontario Bank v. Lightbody* (1834), 13 Wend. (N. Y.), 101; *Roberts v. Fisher* (1870), 43 N. Y. 159; *Townsend v. Bank* (1858), 7 Wis. 185; *Magre v. Carmack*, (1851), 13 Ill. 209; *Westfall v. Bruley* (1859), 10 O. St. 188. Contra, *Bayard v. Shunk* (1841), 1 W. & S. (Pa.) 92; *Bicknell v. Waterman* (1857), 5 R. I. 43.

<sup>3</sup> But see *Timmins v. Gibbins* (1862), 18 Q. B. 722.

<sup>4</sup> *Hoare v. Cazenove* (1812), 16 East, 391, see at 394; *Williams v. Germaine* (1827), 7 B. & C. at 475-477 (head-note incorrect); Cf. Arts. 179, 185; Cf. German Exchange Law, Arts. 60, 62, 63.

<sup>5</sup> *Byles*, p. 270; *Bayley*, 6th ed. p. 178, no decision in point; Cf. Art. 244.

<sup>6</sup> Cf. *Story v. Patten* (1830), 3 Wend. (N. Y.), 486; German Exchange Law, Art. 60; *Nouguier*, § 583.

Estoppels binding acceptor for honor.

Art. 228. The acceptor *supra protest* is bound by the estoppels which bind an ordinary acceptor, and also by the estoppels which would bind the party for whose honor he accepted.<sup>1</sup>

### *Accommodation Party and Person Accommodated.*

Rights of accommodation party.

Art. 229. When a person draws, indorses, or accepts a bill for the accommodation of another, the person accommodated impliedly engages (a) that he will provide funds for the payment of the bill at maturity, (b) that if, owing to his omission so to do, the accommodation party is compelled to pay the bill, he will indemnify such party.<sup>2</sup>

### ILLUSTRATIONS.

1. B. accepts a bill to accommodate the drawer. The drawer sends funds to B. to provide for the bill, but becomes bankrupt before the bill matures. B. can retain those funds to pay the bill with.<sup>3</sup>

2. A. signs a bill as drawer to accommodate the acceptor. It is dishonored. A. receives no notice of dishonor, but nevertheless pays half the amount of the bill to the holder. A. cannot recover this sum from the acceptor, for he has not paid under compulsion.<sup>4</sup>

3. B. accepts a bill to accommodate the drawer, but is not provided with funds to pay it. There is some *prima facie* defense against the holder. B. is sued, defends the action, and has to pay the amount of the bill and costs. B. can recover

<sup>1</sup> *Phillips v. Im Thurn* (1866), 1 L. R. C. P. at 471, S. C. on demurrer (1865), 18 C. B. N. S. 694; see *e.g.*, Art. 138, Illust. 4; Cf. Arts. 212, 216, 219.

<sup>2</sup> *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; *Sleigh v. Sleigh* (1850), 5 Exch. at 516-517, Parke, B.; Cf. *Asprey v. Lery* (1847), 16 M. & W. 851.

<sup>3</sup> *Yates v. Hoppe* (1858), 19 L. J. C. P. 180.

<sup>4</sup> *Sleigh v. Sleigh* (1850), 5 Exch. 514. But see *Ex parte Bishop* (1880), 15 Ch. D. at pp. 410, 417, C. A.

from the drawer the amount he paid, including the costs of defending the action.<sup>1</sup>

Rights of accommodation party.

NOTE.—See accommodation bill and accommodation party defined, Art. 90. An accommodation party who is compelled to pay the bill has all the rights of an ordinary surety in such case, *e. g.*, he is entitled to the benefit of all securities held by the creditor.<sup>2</sup> Where two or more persons become parties to a bill to accommodate some third party, their rights and liabilities between themselves are those of co-sureties, and must be determined irrespective of the position of their names on the instrument.<sup>3</sup> For example, a bill is drawn by one person and indorsed by another for the accommodation of the acceptor. The drawer has to pay the bill. He can sue the indorser for contribution as co-surety, though he could not sue him on the bill.<sup>4</sup>

<sup>1</sup> *Stratton v. Matthews* (1848), 3 Exch. 48; *Baker v. Martin* (1849), 3 Barb. (N. Y.), 634, accommodation indorser; Cf. *Bagnall v. Andrews* (1830), 7 Bing. at 222; *Garrard v. Cottrell* (1847), 10 Q. B. 679; *aliter*, if the action be defended without reasonable cause; *Roach v. Thompson* (1830), M. & M. 487; *Beech v. Jones* (1848), 5 C. B. 696.

<sup>2</sup> *Becheret v. Lewis* (1872), 7 L. R. C. P. at 377; *Gray v. Seckham* (1872), 7 L. R. Ch. 680.

<sup>3</sup> *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350; *Macdonald v. Whitfield* (1883), 8 App. Cas. 733 P. C.; Cf. *Batson v. King* (1859), 4 H. & N. at p. 741.

<sup>4</sup> *Reynolds v. Wheeler* (1861) 30 L. J. C. P. 350.



## CHAPTER VII.

### DISCHARGES.

#### *Discharges in General.*

Discharge defined.

Art. 230. A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable.<sup>1</sup>

*Explanation.*—The transfer of a discharged bill creates a new and valid contract between the parties to the transfer.<sup>2</sup>

NOTE.—In England it is held that if C. is in possession of a bill which has been discharged, *e. g.*, by payment in due course, or by an alteration, and he indorses it to D., who indorses it to E., E. cannot sue either C. or D. as indorsers, but can only recover from D. the amount he paid for the bill, and D. in like manner can recover what he paid from C.<sup>3</sup>

A right of action on a bill must be distinguished from a right of action which a party to a bill may have arising out of the bill transaction, but wholly independent of the instrument. The former can be transferred by negotiating the instrument, the latter cannot. The former is extinguished by the discharge of the instrument, the latter may or may not be so. For example, if one of three joint acceptors pays a bill, it is discharged; but he personally has a right of contribution from his co-acceptors.<sup>4</sup> If an accommodation acceptor pays a bill it is discharged, but he has a personal right of action for

<sup>1</sup> *Harmer v. Steele* (1849), 4 Exch. (W. H. & G.) Ch. 1; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Frerert v. Henry* (1879), 14 Nev. 191.

<sup>2</sup> See Art. 219, note and cases cited; *Eaton v. McKoun* (1852), 34 Me. 510.

<sup>3</sup> *Burchfield v. Moore*, *supra*; Cf. *Burbridge v. Manners* (1812), 3 Camp. at 194, payment; *Cundy v. Marriott* (1831), 1 B. & Ad. 696, stamp; Cf. *Gordon v. Wansey* (1862), 21 Cal. 77.

<sup>4</sup> *Harmer v. Steele*, *supra*, at 14; see the converse, *Houle v. Baxter* (1802), 3 East, 177; Cf. *Boardman v. Paige* (1840), 11 N. H. 431; *Robertson v. Smith* (1821), 18 Johns. (N. Y.) 459.

indemnity. If an acceptance be given for a debt, and the acceptance is paid, both the debt and the bill are discharged. Discharge defined.

*Discharge of Parties.*—Again, the discharge of a bill must be distinguished from the discharge of one or more of the parties thereto, *e. g.*, the acceptor may be discharged by a discharge in bankruptcy while the drawer and indorsers are only liberated to the extent of the dividends or composition received by the holder;<sup>1</sup> or a particular indorser may be discharged by want of notice of dishonor, while the drawer and other indorsers remain liable; or again, an indorser may be discharged as regards a particular party, but not as regards subsequent parties.<sup>2</sup>

Art. 231. When laws conflict the validity and effect of a discharge is (in general) determined by the *lex loci contractus* of the party sought to be charged.<sup>3</sup> Cf. Art. 60. Discharge when laws conflict.

#### ILLUSTRATIONS.

1. Bill accepted at Leghorn payable there. By the old law of Leghorn an acceptor could procure the cancellation of his acceptance if he had not at maturity received funds from the drawer. An acceptor so discharged at Leghorn cannot be sued in England.<sup>4</sup>

2. Bill drawn in the United States (and issued there) on a person in England is dishonored by non-acceptance. The drawer cannot be sued in England if he has been discharged in America under the bankruptcy law there in force.<sup>5</sup>

3. Bill for \$100 drawn and issued in Demerara but accepted and payable in England. At the time the bill matures the holder owes the acceptor \$100. According to Demerara law this operates as a discharge of the bill (by *compensatio*.) The drawer is discharged.<sup>6</sup>

<sup>1</sup> *Re Joint Stock Co.* (1870), 10 L. R. Eq. 11; *Re Jacobs* (1875), 10 L. R. Ch. 211.

<sup>2</sup> Cf. *O'Keefe v. Dunn* (1815), 6 Taunt. at 315; see *e. g.*, Art. 191.

<sup>3</sup> Cf. *Ellis v. McHenry* (1871), 6 L. R. C. P. at 234; *Van Raugh v. Van Arsdaln* (1805), 3 Cai. (N. Y.) 154, and note (3d ed.). But see *Baldwin v. Hale* (1863), 1 Wall. (U. S.) 223.

<sup>4</sup> *Burrows v. Jemino* (1726), 2 Stra. 733.

<sup>5</sup> *Potter v. Brown* (1804), 5 East, 124; Cf. *Symons v. May* (1851), 6 Exch. 707. But see *Braynard v. Marshall* (1829), 8 Pick. (Mass.) 194; *Sturges v. Crowninshield* (1819), 4 Wheat. (U. S.) 122.

<sup>6</sup> *Allen v. Kemble* (1848), 6 Moore, 315; Cf. *Wilkinson v. Simson*

Discharge  
when laws  
conflict.

4. Accommodation bill drawn and issued in Austria, but accepted and payable in England, is dishonored. The holder receives from the drawer in Austria a smaller sum in satisfaction of the bill. This, according to Austrian law, is a valid discharge. A subsequent indorser cannot sue the acceptor in England.<sup>1</sup>

5. Bill drawn, accepted and payable in England. The acceptor is made bankrupt and receives his discharge in Australia. He can be sued on the bill in England.<sup>2</sup>

### *Payment in Due Course.*

Payment in  
due course a  
discharge.

Art. 232. A bill is discharged by payment in due course,<sup>3</sup> that is to say, by payment in accordance with Arts. 234 to 236.

NOTE.—*Satisfaction in General.*—No definition of payment is attempted, for "payment" is not a technical term.<sup>4</sup> The holder of a bill is entitled to receive money (Cf. Arts. 10, 36), but when the time of payment comes he may, if he chooses, receive satisfaction in any other form. Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money, is equally effectual in the case of a bill.<sup>5</sup> Willes, J., seems to think this principle hardly wide enough, having regard to the rule (Art. 239) that accord without satisfaction in some cases suffices.<sup>6</sup>

(18 '8), 2 Moore, P. C. 275; *Powers v. Lynch* (1807), 3 Mass. 77. *Compensatio* is recognized as a discharge in all countries where the civil law prevails. See further on that subject, *Nouguier*, §§ 1053-1060; French Code Civil, Arts. 1289-1299.

<sup>1</sup> *Ralli v. Dennistoun* (1851), 6 Exch. 483, 36th plea and judgment at 493.

<sup>2</sup> *Bartley v. Hodges* (1861), 30 L. J. Q. B. 352; *Van Raugh v. Van Arsdaln* (1805), 3 Cai. (N. Y.) 154.

<sup>3</sup> *Morley v. Culverwell* (1840), 7 M. & W. at 182, Parke, B.

<sup>4</sup> See, per Maule, J., *Maillard v. Argyle* (1843), 6 M. & Gr. at 45.

<sup>5</sup> See, *e. g.*, cases discussed on this basis, *Cripps v. Davis* (1843), 12 M. & W. 159, agreement to set off another debt; *Sibree v. Tripp* (1846), 15 M. & W. 23, negotiable bill for less amount; *Ford v. Beech* (1848), 11 Q. B. 852 Ex. Ch., agreement to suspend; *Ansell v. Baker* (1850), 15 Q. B. 20, merger; *Belshaw v. Bush* (1851), 11 C. B. 207, and *Brooks v. White* (1841), 2 Met. (Mass.) 283, bill of third party; *Woodward v. Pell* (1868), 4 L. R. Q. B. 55, debtor taken in execution; *Brown v. Smith* (1877), 122 Mass. 589; Cf. Art. 251.

<sup>6</sup> Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 126; *Abrey v. Cruz* (1869), 5 L. R. C. P. at 44.

*Presumption of Payment.*—There is a presumption of payment in the case of a bill or note which is twenty years old, quite apart from the statute of limitations.<sup>1</sup> But this presumption is rebuttable.<sup>2</sup>

*Completion of Payment.*—Payment by a banker is complete, and the property in the money passes to the payee when the money is laid on the counter.<sup>3</sup> As regards what constitutes complete and irrevocable payment between banker and banker where there is a clearing house, see the special verdict in *Warwick v. Rogers*.<sup>4</sup> Where there is no clearing house, see *Pollard v. Bank of England*.<sup>5</sup>

*Proceeding for Costs.*—Where the holder of a bill sues concurrently two or more of the parties thereto, and is paid by one of them, he may still proceed against the others for costs incurred.<sup>6</sup>

Art. 233. Part payment of a bill in due course operates as a discharge *pro tanto*.<sup>1</sup>

NOTE.—As to part payment by the drawer or an indorser, Cf. Art. 234, Expl. 2. Under German Exchange Law, Art. 38, the holder cannot refuse part payment, but this is clearly not English or American law. Cf. Arts. 39 and 158, and 206.

Art. 234. Payment, in order to operate as a discharge of the bill, must be made by or on behalf of the drawee<sup>2</sup> or acceptor.<sup>3</sup>

<sup>1</sup> *Bean v. Tonnelle* (1884), 94 N. Y. 381 (where statute had not run because of maker's non-residence); *Smith's Appeal* (1884), 52 Mich. 415; *Pattie v. Wilson* (1881), 25 Kans. 326. Cf. *Brown v. Rutherford* (1880), L. R. 14 Ch. Div. 687.

<sup>2</sup> *Delaney v. Brunette* (1885), 62 Wis. 615.

<sup>3</sup> *Chambers v. Miller* (1862), 32 L. J. C. P. 30.

<sup>4</sup> *Warwick v. Rogers* (1843), 5 M. & G. 340.

<sup>5</sup> *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623.

<sup>6</sup> *Randall v. Moon* (1852), 21 L. J. C. P. 226, as explained by *Cook v. Lister* (1863), 32 L. J. C. P. at 127; *London Bank v. Walkinshaw* (1872), 25 L. T. N. S. 704.

<sup>1</sup> *Graves v. Key* (1832), 3 B. & Ad. 813; Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 125, Willes, J.; *Commercial Bank v. Cunningham* (1837), 20 Pick. (Mass.) at 275. French Code, Art. 156; German Exchange Law, Arts. 38, 39.

<sup>2</sup> *Wilkinson v. Simson* (1838), 2 Moore P. C. at 287. Parks, B.

<sup>3</sup> *Callow v. Lawrence* (1814), 3 M. & S. at 97, Ld. Ellenborough; *Jones v. Broadhurst* (1850), 9 C. B. at 181, Cresswell, J.; *Dodge v. Freedman's Trust Co.* (1876), 93 U. S. 379; *Farmers' Bank v. Rathbone* (1853), 26 Vt. 19; *Dougherty v. Deeny* (1877), 45 Ia. 443. But see *Burr v. Smith* (1855), 21 Barb. (N. Y.) 262.

Payment, by  
whom.

## ILLUSTRATIONS.

1. A bill is accepted by three joint acceptors (not partners). One of them pays it at maturity. The bill is discharged and cannot be again negotiated. It is immaterial that the acceptor who paid accepted the bill for the accommodation of the other two.<sup>1</sup>

2. A bill accepted payable at a bank and indorsed in blank by C., is sent to D. to collect. D. improperly discounts it. To regain possession, D. goes to the acceptor's bankers, pays in the amount of the bill, and asks to have the bill given up to him, when the holder has been paid. This is done. The bill is not discharged. C. can sue the acceptor.<sup>2</sup>

3. C. is the holder of a dishonored bill indorsed in blank. D. pays the amount and costs to C. in order to get the bill and sue on it. C. parts with the bill under the impression that D. has paid it on behalf of the acceptor. The bill is not discharged. D. can sue the drawer.<sup>3</sup>

4. A joint and several note is paid at maturity by one of the makers. The note is discharged.<sup>4</sup>

*Explanation 1.*—Payment of an accommodation bill by the person accommodated is deemed to be a payment made on behalf of the acceptor, and operates as a discharge.<sup>5</sup>

<sup>1</sup> *Harmer v. Steele* (1849), 4 Ex. at 13-14, Ex. Ch.; Cf. *Bartrum v. Caddy* (1838), 9 A. & E. 275, note on demand paid by accommodation maker; *Pray v. Maine* (1851), 7 Cush. (Mass.) 253; *Honkins v. Scott* (1855), 32 N. H. 425; *Frecert v. Henry* (1879), 14 Nev. 191.

<sup>2</sup> *Deacon v. Stodhart* (1841), 2 M. & Gr. 317; *Thomas v. Fenton* (1847), 5 D. & L. 28, see at 38; Cf. *Walter v. James* (1871), 6 L. R. Ex. 124; *Dodge v. Freedman's Trust Co.* (1876), 93 U. S. at 386.

<sup>3</sup> *Lyon v. Maxwell* (1868), 18 L. T. N. S. 28. But see *Lancey v. Clark* (1876), 64 N. Y. 209.

<sup>4</sup> *Beaumont v. Greathead* (1846), 2 C. B. 494; *Davis v. Stevens* (1839), 10 N. H. 186; *Eastman v. Plummer* (1855), 32 N. H. 238.

<sup>5</sup> *Cook v. Lister* (1863), 32 L. J. C. P. at 127, Willes, J.; see also *Lazarus v. Cowie* (1852), 3 Q. B. 459, criticised but followed in *Jenel v. Parr* (1855), 13 C. B. 909, apparently approved, *Parr v. Jewell* (1855), 16 C. B. 684 at 709, Parke, B., Ex. Ch.; *Jones v. Broadhurst* (1850), 9 C. B. at 181 and 189; *Ralli v. Dennistoun* (1851), 6 Exch. 483, 36th plea and judgment at 493; *Strong v. Foster* (1855), 17 C. B. at 222; *Re Oriental Bank* (1871), 7 L. E. Ch. at 102; *Woods v. Woods* (1879), 127 Mass. 141.

## ILLUSTRATION.

Payment, by  
whom

A bill is accepted for the accommodation of the drawer. The drawer negotiates the bill, and then takes it up at maturity. Subsequently he re-issues it. The holder cannot sue the acceptor, for the bill is discharged.<sup>1</sup>

NOTE.—See Art. 90, defining “accommodation bill.” The discharge may be supported on the ground adopted by Willes, J., that the person accommodated pays as the acceptor’s agent, or on the ground that the bill has been paid by the principal debtor. Cf. Art. 245, as to principal and surety, and Art. 134, n., equities attaching to overdue bill.

*Explanation 2.*—Subject to Expl. 1, payment by the drawer or indorser of a bill, as such, is not a discharge of it,<sup>2</sup> but is merely a purchase thereof.

## ILLUSTRATIONS.

1. The acceptor of a bill, originally payable to drawer’s order, dishonors it. The drawer pays the holder and gets the bill. He may either sue the acceptor himself, or he may strike out his own and the subsequent indorsements and again negotiate the bill away.<sup>3</sup>

2. A bill drawn by A., payable to C. or order, and by C. indorsed to D., is dishonored by the acceptor at maturity. The drawer pays D. and gets the bill. He may sue the acceptor, but he cannot re-issue the bill.<sup>4</sup> *Aliter*, it seems, if C. or D. had indorsed in blank.<sup>5</sup>

3. The C. bank discount a bill, which is accepted payable at their house, and then indorse it away. At maturity it is presented to the C. bank and paid. It is a question of fact whether they paid as the agents and bankers of the acceptor, or

<sup>1</sup> *Lazarus v. Cowie*, (1842), 3 Q. B. 459; Cf. *Blenn v. Lyford* (1879), 70 Me. 149, note paid by accommodated payee; Cf. Art. 230, discharge defined.

<sup>2</sup> *Jones v. Broadhurst* (1850), 9 C. B. 173; *Kemp v. Balls* (1854), 10 Exch. 607; *Woodward v. Pell* (1868), 4 L. R. Q. B. 55; *French v. Jarvis* (1860), 29 Conn. 347; *Bank v. Senior* (1876), 11 R. I. 376; *Woodman v. Hothby* (1876), 66 Me. 389.

<sup>3</sup> *Callow v. Lawrence* (1814), 3 M. & S. 95; *Hubbard v. Jackson* (1827), 4 Bing. 390; Cf. Art. 119, n.; *Bank v. Senior*, *supra*; *Ellsworth v. Brewer* (1831), 11 Pick. (Mass.) 315.

<sup>4</sup> Cf. *Williams v. James* (1850), 15 Q. B. at 505, Patteson, J.; *Gardner v. Maynard* (1863), 7 Allen (Mass.), 456.

<sup>5</sup> See Art. 130; *sed contra*, *Daniel*, § 1240.

Payment, by  
whom.

whether they took up the bill as indorsers. In the latter case it is not discharged, and they can sue the drawer, or if he be a customer, debit him with the amount of the bill.<sup>1</sup>

4. The indorser of a bill writes to the drawer promising to "retire" it, and accordingly takes it up before maturity. The bill is not discharged.<sup>2</sup>

*Explanation 3.*—Subject to Expl. 1, when a bill is paid wholly or in part by the drawer or by an indorser, and the holder retains possession of the bill, he holds it as trustee for such drawer or indorser as regards the amount received.<sup>3</sup>

NOTE.—In America this rule was held applicable in case of the bankruptcy of the acceptor, and that the holder was entitled to prove for the face of the bill, notwithstanding he may have received a sum of money from an indorser in discharge of his liability.<sup>4</sup> But in England, the sum so received must be deducted from the amount for which the holder is entitled to prove against the acceptor's estate.<sup>5</sup> The right of the holder to retain the bill when he has been paid by the drawer or an indorser depends on the arrangement between them.<sup>6</sup> In France and other countries where the civil law is followed, payment by the drawer or an indorser discharges the bill, the rule being *debitorem ignarum seu etiam inuitum solvendo liberare possumus*.

Payment, at  
what time.

Art. 235. Payment in order to operate as a discharge of the bill must be made at or after the maturity thereof.<sup>7</sup>

<sup>1</sup> *Pollard v. Ogden* (1853), 2 E. & B. 459; Cf. *Pacific Bank v. Mitchell* (1845), 9 Met. (Mass.) 297; *Dougherty v. Deeny* (1877), 45 Ia. 443.

<sup>2</sup> *Elsam v. Denny* (1854), 15 C. B. 87; see at 94 as to the meaning of "retire," but see a different construction put on the term, *Ex parte Reed* (1872), 14 L. R. Eq. at 593.

<sup>3</sup> *Jones v. Broadhurst* (1850), 9 C. B. at 183; *Cook v. Lister* (1863), 3 L. J. C. P. at 127, Willes, J.; *Thornton v. Maynard* (1875), 10 L. R. C. P. 695; Cf. Art. 141, as to effect of this, if holder sues.

<sup>4</sup> *Ex parte Talcott* (1873), 9 Bankr. Reg. 502; *Downing v. Traders' Bank* (1873), 2 Dill. (C. Ct.) 136.

<sup>5</sup> *Ex parte Taylor* (1857), 26 L. J. Bankr. 58; *Ex parte Mazondoff* (1868), 6 L. R. Eq. 582.

<sup>6</sup> *Jones v. Broadhurst*, *supra*; Cf. *Woodward v. Pell* (1868), 4 L. R. Q. B. 55, as to a lien for costs, and Art. 206, and *Duncan, Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at pp. 17, 18.

<sup>7</sup> *Burbridge v. Manners* (1812), 3 Camp. at 194; *Beaumont v. Grent-head* (1846), 2 C. B. 494 (after maturity). French Code, Arts. 144-146.

*Explanation.*—Payment by the drawee or acceptor <sup>payment, at what time.</sup> previous to maturity operates as a mere purchase of the bill, and subject to Art. 238 he may, if the form of the bill permit, re-issue and further negotiate it.<sup>1</sup>

## ILLUSTRATIONS.

1. Accepted bill payable three months after date. A month before it matures the holder indorses it for value to the acceptor. The next day the acceptor indorses it to D. D. can sue all parties to the bill.<sup>2</sup>

2. An accepted bill payable three months after date is held by C. A month before it matures the acceptor pays C., but C. retains the bill. The next day C. indorses it to D., who takes it for value and without notice of the payment. D. can sue the acceptor.<sup>3</sup>

NOTE.—Premature payment or any other premature discharge is of course valid *inter partes*.

Art. 236. Payment in order to operate as a discharge of the bill must be made to the holder or to some person authorized to receive payment on his behalf.<sup>4</sup> <sup>payment, to whom.</sup>

*Exception 1.*—Payment to the *de facto* holder who holds a bill wrongfully operates as a discharge if it be made in good faith and without notice.<sup>5</sup>

<sup>1</sup> *Morley v. Culnerwell* (1840), 7 M. & W. 174; see at 182, *Parke, B.; Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244; Cf. Art. 130.

<sup>2</sup> *Id.*; Cf. *Rogers v. Gallagher* (1868), 49 Ill. 182, Cf. *Swope v. Ross* (1861), 40 Pa. St. 186; Art. 130.

<sup>3</sup> (Cf. *Dod v. Edwards* (1827), 2 C. & P. 602, premature release; *Cripps v. Davis* (1843), 12 M. & W. 159; *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; *Wheeler v. Guild* (1838), 20 Pick. (Mass.) 545; *Grant v. Kidwell* (1860), 30 Mo. 455.

<sup>4</sup> (Cf. *Lefley v. Mills* (1791), 4 T. R. at 175; *Walker v. Macdonald* (1848), 2 Exch. at 532; *Mayo v. Moore* (1862), 28 Ill. 4; 8; *Pier v. Bullis* (1879), 48 Wis. 429; *Dodge v. Bank* (1877), 30 O. St. 1; *Nouguier*, § 889; *Pothier*, Nos. 164-167.

<sup>5</sup> (Cf. *Roberts v. Tucker* (1851), 16 Q. B. at 579, Ex. Ch.; and see *Jones v. Fort* (1829), 9 B. & C. at 768; *Gray v. Johnston* (1868), 3 L. R. H. L. at 14; *Wheeler v. Guild*, *supra*; *Lamb v. Mattheis*, (1868), 41 Vt. 42; *Tarpley v. McWhorter* (1876), 56 Ga. 410; *Pothier*, Nos. 168-169.



Payment, to  
whom.

## ILLUSTRATIONS.

1. A bill is payable to "John Smith or order." Another person of the same name gets the bill and presents it. The acceptor pays him. The bill is not discharged. The acceptor is still liable to the real John Smith. Art. 81.

2. A bill indorsed in blank is stolen. The thief presents it to the acceptor at maturity and obtains payment. If the acceptor pays *bona fide* he is discharged.<sup>1</sup>

NOTE.—Another exception exists in England by virtue of the Code, § 60, which provides that when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.<sup>2</sup> German Exchange Law, Art. 36, extends this protection to all payors. Cf. Indian Code, Art. 85. French Code, Art. 145, provides that payment at maturity made "without opposition" discharges the payor. In America, the bank paying the holder under a forged indorsement cannot charge the drawer with the payment.<sup>3</sup> See Arts. 125–128, determining who is the *de facto* holder, Art. 144, as to lost bills, and Art. 29 as to bills drawn in a set. Arts. 141–143 show that the acceptor must pay unless the holder is shown to hold the bill wrongfully. Art. 94 shows that the payor may set up the *jus tertii* and decline to pay a wrongful holder. But there is no decision to show when he must set up the *jus tertii*. It is conceived that the same test of *bona fides* would be applied to the payor that is applied to an indorsee. See Art. 86, n. Payor and indorsee alike part with value and get the bill.

*Holder's Identity.*—Under some continental codes, when a bill is payable specially, and the holder is a stranger, he is bound to give some proof of identity.<sup>4</sup> By our law it is not.

<sup>1</sup> *Smith v. Sheppard* (1776), cited *Chitty*, 10th ed. 2, 150, n.; Cf. *Roberts v. Tucker* (1851), 16 Q. B. at 576, Parke, B.

<sup>2</sup> Reproducing 16 & 17 Vict. 59, § 19; see *Charles v. Blackwell* (1877), 2 L. R. C. P. D. at 156; *Ogden v. Senas* (1874), 9 L. R. C. P. 513, decided under this statute.

<sup>3</sup> *Morgan v. Bank* (1854), 11 N. Y. 404; *Corn Exchange Bank v. New York Bank* (1883), 91 N. Y. 74; *Belknap v. Nat. Bank* (1868), 100 Mass. 376.

<sup>4</sup> *Nouguier*, § 897.

ceived that possession is *prima facie* evidence of identity,<sup>1</sup> and that if the payor doubts the identity of the person presenting or the genuineness of the instrument, he must pay or refuse to pay, at his own risk. There is a dictum by Maule, J.,<sup>2</sup> that in such case the payor would be allowed a reasonable time to make inquiry, but having regard to the duties of the holder this seems very questionable.

Art. 237. When payment of a bill is made by mistake to a person who is not entitled to receive payment, and who cannot give a discharge,<sup>3</sup> the money so paid may be recovered back by the payor as follows:—

(1.) The payor of a forged, altered, or canceled bill, who has been led to pay it by the negligence of his correspondent or customer, and has not himself been guilty of negligence, can recover the money so paid from such correspondent or customer.

#### ILLUSTRATIONS.

1. A. draws a check on his bankers for \$50, carelessly leaving a blank space before the words and figures "fifty." The holder fills it up as a check for \$150, and obtains payment. The banker can charge A. with the amount so paid.<sup>4</sup>

2. A. draws in the ordinary way a check for \$50. It is altered to \$150. The alteration is not apparent. A.'s banker pays it. He can only charge A. with \$50.<sup>5</sup>

3. A. draws a bill on B., and indorses it in blank. Subsequently, intending to cancel it, he tears it into four pieces, and throws the pieces away. C. picks up the pieces, pastes them together, and presents the bill to B. and obtains payment. If the marks of cancellation are apparent, B. cannot recover the money so paid from A.<sup>6</sup> *Aliter*, if the marks be not apparent.<sup>7</sup>

<sup>1</sup> Cf. *Bulkeley v. Butler* (1824), 2 B. & C. at 441, Bayley, J.

<sup>2</sup> *Roberts v. Tucker* (1851), 16 Q. B. at 578.

<sup>3</sup> Art. 236, as to who can give discharge.

<sup>4</sup> *Young v. Grote* (1827), 4 Bing. 253, as explained by *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. at 586; *Halifax Union v. Wheelwright* (1875), 10 L. R. Ex. 183; Cf. Arts. 23, 52.

<sup>5</sup> *Hall v. Fuller* (1826), 5 B. & C. 750; Cf. *Trigg v. Taylor* (1858), 27 Mo. 245.

<sup>6</sup> *Scholey v. Ramsbottom* (1810), 2 Camp. 435; Cf. Art. 138.

<sup>7</sup> Cf. *Ingham v. Primrose* (1859), 7 C. B. N. S. 82.

Recovery by  
payor of  
money paid by  
mistake.

4. A bill held under a forged indorsement is presented to B. for acceptance. B. accepts it payable at his bankers'. The bankers pay it. They cannot charge B. with the amount.<sup>1</sup>

(2.) The payor can recover the money paid from the person who received it when such person did not act *bona fide* in demanding payment of the bill.<sup>2</sup>

(3.) The payor can recover the money paid from the person who received it when such person acted *bona fide* in demanding payment of the bill, provided (a) that the payor was not guilty of negligence in making the payment,<sup>3</sup> and (probably) (b) that the position of the party receiving payment has not altered before the discovery of the mistake and notification thereof.<sup>4</sup>

#### ILLUSTRATIONS.

1. A check is presented and paid. Directly after the payment the bankers discover that the drawer's account was overdrawn. They cannot recover the money so paid from the holder of the check.<sup>5</sup>

2. A bill purporting to be drawn by A. on B., is paid by B. Subsequently B. discovers that A.'s signature was a forgery. B. cannot recover the money from the holder to whom he paid it.<sup>6</sup>

3. C., the holder of a bill purporting to be accepted payable

<sup>1</sup> *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch. *First Nat. Bank v. Tappan* (1870), 6 Kans. 465.

<sup>2</sup> *Martin v. Morgan* (1819), 3 Moore, 635; Cf. Arts. 81 and 94; *Kendal v. Wood* (1871), 6 L. R. Ex. 243; *First Nat. Bank v. Ricker* (1874), 71 Ill. 439; *Nat. Bank v. Bangs* (1871), 106 Mass. 441, at 444.

<sup>3</sup> *Sed qu.* See *Lawrence v. American Bank* (1873), 54 N. Y. 432; Cf. *Nat. Bank v. N. B. Assn.* (1873), 55 N. Y. at 215.

<sup>4</sup> *Welch v. Goodwin* (1877), 123 Mass. 71; Cf. *Merchants Bank v. Eagle Bank* (1869), 101 Mass. at 285; *Nat. Bank v. N. B. Assn. supra.*

<sup>5</sup> Cf. *Chambers v. Miller* (1862), 32 L. J. C. P. 30; *Boylston Bank v. Richardson* (1869), 101 Mass. 287; *Oddie v. Bank* (1871), 45 N. Y. 735.

<sup>6</sup> *Price v. Neal* (1762), 3 Burr. 1355; *Nat. Park Bank v. Bank* (1871), 46 N. Y. 77; *Bank v. F. & M. Bank* (1838), 10 Vt. 141; Cf. *Ellis v. Ohio Trust Co.* (1855), 4 O. St. at 652. But see *Goddard v. Bank* (1850), 4 N. Y. 147; *Allen v. Bank* (1874), 59 N. Y. 12, holding *aliter* if paid before any opportunity to inspect the bill. Cf. Art. 212.

at a bank, indorses it to D. for collection. D. obtains payment, and hands the money over to C. A week after the payment the bank discovers that the acceptance was a forgery. They cannot recover the money from C.<sup>1</sup>

Recovery by  
payor of  
money paid by  
mistake.

4. A bill, purporting to bear the indorsement of C., is held by F. It is dishonored. X. pays it *supra protest* for C.'s honor. The same day he discovers that C.'s indorsement was a forgery, and gives notice to F. X. can (perhaps) recover the money from F.<sup>2</sup>

5. C., the indorser of a bill, pays D., the holder, in ignorance that he has been discharged by D.'s omission to present it for payment. A week after he discovers this fact. C. can recover the money he paid from D.<sup>3</sup>

6. C. is the holder of a bill purporting to be accepted by B., payable at his bankers'. The bank pay the bill. Next day they discover that the acceptance was a forgery, and give notice to C. They cannot recover the money from C.<sup>4</sup>

7. A bill held by C., and purporting to be accepted by B., is presented to B. for payment. B. inspects and pays it. Subsequently he discovers that his signature was forged. He cannot recover the money from C.<sup>5</sup>

8. A genuine bill fraudulently altered in amount from \$10 to \$100 is subsequently accepted and paid. Four months afterwards the acceptor discovers the fraud and gives immediate notice to the holder he paid. He can (probably) recover the money.<sup>6</sup>

<sup>1</sup> *Smith v. Mercer* (1815), 6 Taunt. 76.

<sup>2</sup> *Wilkinson v. Johnston* (1824), 3 B. & C. 428; Cf. *Goddard v. Bank supra*; *Carpenter v. North Bank* (1877), 123 Mass. 66; but Cf. *Phillips v. Im Thurn* (1866), 1 L. R. C. P. 463.

<sup>3</sup> *Milnes v. Duncan* (1827), 6 B. & C. 671; Cf. *Farmers Bank v. Small* (1825), 2 Mon. (Ky.) 83; *Kelly v. Solari* (1841), 9 M. & W. at 59.

<sup>4</sup> *Cocks v. Masterman* (1829), 9 B. & C. 902; Cf. *Commercial Bank v. First Nat. Bank* (1868), 30 Md. 11 (check).

<sup>5</sup> *Mather v. Maidstone* (1856), 18 C. B. 273 at 295; *Gloucester Bank v. Salem Bank* (1820), 17 Mass. 33, see at 44; *U. S. Bank v. Georgia Bank* (1825), 10 Wheat. (U. S.) 333. But see *Welch v. Goodwin* (1876), 123 Mass. 71.

<sup>6</sup> *White v. Cont. Nat. Bank* (1876), 64 N. Y. 316; *Fraker v. Little* (1880), 24 Kans. 598; *Clews v. Bank of N. Y. Nat. Banking Assn.* (1882), 89 N. Y. 418, (certified check); Cf. *Nat. Bank v. N. B. Assn.* (1873), 55 N. Y. 211; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Sheridan v. Carpenter* (1872), 61 Me. 83; *City Bank v. First Nat. Bank* (1876), 45 Tex. 208.

Recovery by  
payor of  
money paid by  
mistake.

9. A note purporting to be signed by B. is presented to him by a *bona fide* holder for payment, and paid. B. cannot recover the money from the payee, as he is chargeable with negligence.<sup>1</sup>

10. A check drawn by A. to C.'s order upon the B. bank, is presented by the E. bank, with which D. had deposited it for collection, and paid. The E. bank credits D.'s account with the proceeds. Two years afterwards A. discovers that C.'s indorsement is forged, and notifies the B. bank. The latter may recover the amount paid from the E. bank, although it has meanwhile paid the proceeds out to D., and he has become insolvent.<sup>2</sup>

NOTE.—The reasons given for the decisions are very conflicting. Illustrations 2, 3 and 6, might well be supported on the ground that the payor is bound to recognize the signature of his own correspondent or customer (Cf. Art. 212), this being matter peculiarly within his own knowledge; but apart from this, it seems on principle that a person presenting a bill for payment ought to warrant its genuineness and his right to receive payment, just as a transferor by delivery warrants genuineness and his right to transfer (Art. 226). They are dicta to this effect,<sup>3</sup> but the point must be regarded as very questionable: Cf. Art. 236, n. It seems to be the tendency of American authorities to limit the doctrine of *Price v. Neal* (3 Burr. 1355) to cases strictly analogous, and to permit recovery although payor may have been negligent in paying, provided the situation of the party receiving payment has not altered before the discovery of the mistake and notification thereof.

### *Coincidence of Right and Liability.*

Acceptor the  
holder at ma-  
turity.

Art. 238. A bill which has been negotiated is discharged, when the acceptor either is or becomes the holder thereof at or after maturity. Cf. Art. 235.

*Exception.*—Acceptor holding a bill as administrator of the late holder.<sup>4</sup>

<sup>1</sup> *Johnston v. Commercial Bank* (1885), 27 W. Va. 343.

<sup>2</sup> *Corn Exchange Bank v. Nassau Bank* (1883), 91 N. Y. 74.

<sup>3</sup> Cf. *Wilkinson v. Johnston* (1824), 3 B. & C. at 437; *Woods v. Thiedeman* (1862), 1 H. & C. at 495, Bramwell, B.; *sed contra*, *East India Co. v. Tritton* (1824), 3 B. & C. at 291.

<sup>4</sup> *Williams on Executors*, 7th ed. p. 1313.

## ILLUSTRATIONS.

Acceptor the  
holder at ma-  
turity.

1. A bill payable after date and accepted by three joint acceptors is held by C. C., before the bill matures, indorses it to B., one of the acceptors. If B. retains the bill till its maturity, it is discharged.<sup>1</sup>

2. B. is the maker of a note payable on demand. The holder dies, having appointed B. his executor. The note is discharged.<sup>2</sup>

3. B. is the maker of a note payable on demand. B. dies, having appointed C., the holder, his executor. The note is not discharged unless C. have assets available for the payment of it; and he can validly indorse it away at any time before he has such assets.<sup>3</sup>

4. B., X. and Y. make a joint and several note payable on demand to B.'s wife, in consideration of money lent by her as administratrix to B. X. and Y. sign as sureties for B. On B.'s death, his widow can sue X. and Y.<sup>4</sup>

NOTE.—Statutes in America have changed the common law effect of the creditor's appointment of the debtor as his executors. As to "discharge," see Art. 230. The general rule is that a present right and liability united in the same person, cancel each other. This mode of discharge is called in the civil law *confusio*; and is recognized in all countries whose law is founded on the civil law.<sup>5</sup>

### Waiver or Cancellation.

Art. 239. A bill is discharged when the holder of it at or after maturity absolutely and unconditionally renounces his rights against the acceptor.

Waiver or can-  
cellation by  
holder.

<sup>1</sup> *Harmer v. Steele* (1849), 4 Exch. 1, Ex. Ch.; Cf. *Mainwaring v. Newman* (1800), 2 B. & P. 120 (two firms with common partner); *Neale v. Turton* (1827), 4 Bing. 149; *Hall v. Kimball* (1875), 77 Ill. 161; *M'Gee v. Prouty* (1845), 9 Met. (Mass.) 547; *Witte v. Williams* (1876), 8 S. C. 290; *Stewart v. Hidden* (1868), 13 Minn. 431.

<sup>2</sup> *Freakley v. Fox* (1829), 9 B. & C. 130, but the executors must account for the amount of the note as assets; *Williams on Executors*, 7th ed. pp. 1310-1315; Cf. *Mitchell v. Rice* (1831), 6 J. J. Marsh. (Ky.) at 625.

<sup>3</sup> *Lowe v. Peskett* (1855), 16 C. B. 500; Cf. *Mitchell v. Rice*, *supra*.

<sup>4</sup> *Richards v. Richards* (1831), 2 B. & Ad. 447; Cf. *Beecham v. Smith* (1858), E. B. & E. 442.

<sup>5</sup> As to France, see *Nouguier*, §§ 1061-1065. Qu. if German Exchange Law, Art. 10, is a departure from the rule.

Waiver or cancellation by holder.

The liabilities of any party to a bill may in like manner be released by the holder verbally and without consideration either before or after its maturity;<sup>1</sup> but such release if given before maturity is inoperative against a subsequent holder for value who takes the bill before maturity and without notice.<sup>2</sup>

#### ILLUSTRATIONS.

1. The holder of a bill at maturity tells the acceptor that he renounces all claims against him and gives up the bill to him. The bill is discharged.<sup>3</sup>

2. The holder of a bill before it matures writes to the first indorser that he renounces all claim against him. The first and subsequent indorsers are (probably) discharged as regards such holder. The drawer and acceptor are not.<sup>4</sup>

3. The holder of a bill verbally agrees with the drawer that he will not exercise his right of recourse against him if a certain event takes place. The event happens. The drawer is not discharged, for this is merely an oral agreement to vary the effect of a bill as drawn, and not an absolute waiver of the drawer's liabilities.<sup>5</sup>

4. The holder of a bill strikes out the acceptor's signature, intending to cancel it. This is a waiver of the acceptance, and discharges the bill.<sup>6</sup> *Aliter*, if the cancellation be not apparent, and the bill be negotiated to a holder for value before maturity.<sup>7</sup>

<sup>1</sup> *Foster v. Dauber* (1851), 6 Exch. 839 at 851, 852, Parke, B.; Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 126; *Abrey v. Cruz* (1869), 5 L. R. C. P. at 44. Willes, J.; *Pothier*, Nos. 175-183. But see *Crawford v. Millspaugh* (1816), 13 Johns. (N. Y.). 87; *Harrison v. Close* (1807), 2 Johns. (N. Y.). 448; *Kidder v. Kidder* (1859), 33 Pa. St. 768; *Smith v. Bartholomew* (1840), 1 Met. (Mass.) 276; *Byles*, 7th Am. Ed. p. \*236, Sharawood's note.

<sup>2</sup> Cf. *Ingham v. Primrose* (1859), 7 C. B. N. S. 82, and Art. 235.

<sup>3</sup> *Whatley v. Tricker* (1807), 1 Camp. 85, and *Foster v. Dauber*, *supra*; *Larkin v. Hardenbrook* (1882), 90 N. Y. 333.

<sup>4</sup> *Pothier*, Nos. 182, 183; *Nouguier*, §§ 1048-1049; Cf. *Delatorre v. Barclay* (1814), 1 Stark. 7.

<sup>5</sup> *Abrey v. Cruz* (1869), 5 L. R. C. P. 37.

<sup>6</sup> Cf. *Sweeting v. Halse* (1829), 9 B. & C. at 369; *Yglesias v. Bank* (1877), 3 L. R. C. P. D. 60.

<sup>7</sup> *Ingham v. Primrose* (1859), 7 C. B. N. S. 82, and Art. 138.

5. B. accepts the first part of a foreign bill drawn in a set <sup>Waiver or cancellation by holder.</sup> of two, and sends it, as directed, to a bank to be held at the disposition of the holder of the second. The drawer, who is the holder of the second part, failing to discount it, cancels it, and directs the bank to deliver up the first to B. B. gets the first part and cancels his acceptance. B. is discharged, and if the drawer subsequently issue a fresh second part, the holder cannot sue B.<sup>1</sup>

NOTE.—This mode of discharge, called in France “Remise volontaire,” is recognized in all countries where the civil law is followed. Compare Art. 168, clause 6, and Art. 200, clause 7, as to waiver of the holder's duties, and Art. 119, n., as to striking out indorsements.

Art. 240. The cancellation of a signature is *prima facie* evidence that the liabilities of the party whose signature is canceled have been discharged, but the cancellation may be shown to have been made by mistake, and is then inoperative.<sup>2</sup>

### *Payment for Honor Supra Protest.*

Art. 241. A bill which has been protested or <sup>Payment supra protest.</sup> noted for non-payment, may be paid *supra protest* for the honor of any party liable thereon.<sup>3</sup> It then ceases to be negotiable.<sup>4</sup>

Payment *supra protest* must be duly attested by a notarial act of honor.<sup>5</sup>

<sup>1</sup> *Ralli v. Dennistoun* (1851), 6 Exch. 483.

<sup>2</sup> *Brett v. Marston* (1858), 45 Me. 401; *Raper v. Birkbeck* (1812), 15 East, 17, acceptance canceled by referee in case of need. *Wilkinson v. Johnston* (1824), 3 B. & C. 428, indorsements canceled by payor for honor. *Norelli v. Rossi* (1831), 2 B. & Ad. 757; *Warwick v. Rogers* (1842), 5 M. & Gr. 340, at 373, acceptance canceled by bank where payable; *Prince v. Oriental Bank* (1878), 3 L. R. Ap. Ca. 325, P. C., note canceled by maker's banker.

<sup>3</sup> *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105; Cf. *Ex parte Wyld* (1860), 2 DeG., F. & J. 642; *Brooks' Notary*, 4th ed. 108-110.

<sup>4</sup> *Ex parte Swan* (1868), 6 L. R. Eq. 344; *Nouguier*, § 1026; Cf. *Deacon v. Stodhart* (1841), 2 M. & Gr. at 320.

<sup>5</sup> Cf. *Ex parte Wyld*, *supra*; *Brooks' Notary*, 4th ed. 108-110; for forms, see pp. 226-228.



Payment *supra*  
*protest.*

NOTE.—Promissory notes are sometimes, though not often, paid *supra protest*. The “act of honor” is founded on a declaration by the payor or his agent stating for whose honor he desires to pay. Payment *supra protest* is known in France as payment “par intervention,” which expresses its nature.

Who may pay  
*supra protest.*

Art. 242. A bill may be paid *supra protest* by the acceptor *supra protest*, or referee in case of need,<sup>1</sup> or (perhaps) by any other person, whether a party liable on the bill or not.<sup>2</sup>

NOTE.—By French Code, Art. 159, payment *supra protest* may be made by “tout intervenant,” but this is interpreted to mean any person other than a party already liable on the bill.<sup>3</sup> The limitation seems reasonable, having regard to the rights acquired by the payor. It is clear the acceptor *supra protest* can only pay for the honor of the party for whose honor he accepted. French Code, Art. 159, and German Exchange Law, Art. 64, provide that if two or more persons offer to pay *supra protest*, he whose payment will liberate most parties must be preferred.

Holder's obli-  
gation to re-  
ceive payment  
for honor.

Art. 243. A holder who refuses to receive payment *supra protest* (perhaps) loses his right of recourse against the parties who would have been discharged thereby.<sup>4</sup>

NOTE.—An object for refusing might be the prospect of gain on the re-exchange.

Rights and  
duties of payor  
for honor.

Art. 244. The payor *supra protest* on payment of the amount of the bill and expenses, is entitled to receive from the holder the bill itself and the protest.<sup>5</sup>

<sup>1</sup> Cf. 6 & 7 Will. 4, c. 58; German Exchange Law, Art. 62.

<sup>2</sup> *Byles*, p. 272. No decision in England. *Sed contra, Smith v. Sawyer* (1867), 55 Me. 139.

<sup>3</sup> *Nouguier*, §§ 1004-1008.

<sup>4</sup> *Nouguier*, § 1009; German Exchange Law, Art. 62. No English decision.

<sup>5</sup> German Exchange Law, Art. 63; Cf. Art. 206; *Denston v. Henderson* (1816), 13 Johns. (N. Y.) 322. No decision in England, but such is the practice.

The payor *supra protest* by such payment is in-vested with both the rights and the duties of the holder as regards the party for whose honor he pays, and all prior parties liable on the bill to such party; but all parties subsequent to him for whose honor payment is made are discharged.<sup>1</sup>

Rights and  
duties of payor  
for honor.

#### ILLUSTRATION.

A dishonored bill is held by the fifth indorsee. If X. pays it *supra protest* for the honor of the acceptor, he acquires a right to re-imbursement against the acceptor alone; if he pays for the honor of the first indorser, he can sue the first indorser and the drawer (provided they have due notice) and the acceptor, but the second and subsequent indorsers are discharged.

NOTE.—*Pothier*, Nos. 113, 114, points out that the right of the payor is not, properly speaking, a right of action on the bill, but a right arising out of the quasi contract *negotiorum gestorum*, hence the payor cannot again negotiate the bill, or transfer his rights.

#### *Discharge of Surety by Dealings with Principal.*

Art. 245. Where the relationship of principal and surety exists between the parties to a bill, or the parties to a bill transaction, and the holder, having notice thereof, engages to give time to or voluntarily discharges the principal, the surety or sureties are thereby discharged,<sup>2</sup> unless the holder, in so doing, expressly reserves his rights against the surety or sureties, thereby preserving the remedy over.<sup>3</sup>

Discharge of  
surety by cer-  
tain dealings  
with principal.

<sup>1</sup> *Goodall v. Polhill* (1845), 14 L. J. C. P. 146, and *Wood v. Pugh* (1836), 7 O. pt. 2, 156, duties, *e. g.* notice of dishonor; *Ex parte Swan* (1868), 6 L. R. Eq. 344, rights; Cf. *Ex parte Wyld* (1860), 2 DeG. F. & J. 642; French Code, Art. 159; German Exchange Law, Art. 63.

<sup>2</sup> *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. 142, affirmed (1874), 7 L. R. H. L. 348.

<sup>3</sup> *Owen v. Homan* (1859), 4 H. of L. Cas. 997; *Muir v. Crawford* (1875), L. R. 2 Sc. Ap. 456, H. L.

Discharge of  
surety by cer-  
tain dealings  
with principal.

And the surety or sureties are discharged *pro tanto* where the holder releases to the principal collateral securities of the latter held to secure the payment of the bill.<sup>1</sup>

*Explanation.*—*Prima facie* the acceptor of a bill is the principal debtor, and the drawer and indorsers are as regards him, sureties, and the drawer of a bill is the principal as regards the indorsers, and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order;<sup>2</sup> but evidence for the present purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal.<sup>3</sup>

#### ILLUSTRATIONS.

1. The holder of a bill takes from the acceptor in lieu of payment a new bill payable at a future day, to which the drawer and indorsers are not parties. This discharges the drawer and indorsers.<sup>4</sup>

2. The holder of a bill for \$200 takes from the acceptor \$100 in full discharge of his claim, but expressly reserves his rights against the drawer and indorsers (thereby preserving their rights against the acceptor). The drawer and indorsers are not discharged.<sup>5</sup>

3. The holder of a bill for \$100 accepts a composition of 10 cents on the dollar from the acceptor under the Bankruptcy

<sup>1</sup> See cases cited to Illust. 5, *infra*.

<sup>2</sup> Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 127, per Willes, J.

<sup>3</sup> *Ewin v. Lancaster* (1865), 6 B. & S. at 577; *Oriental Corp. v. Overend*, *supra*; *Re Goodwin* (1879), 5 Dillon (C. Ct.), 140; *Guild v. Butler* (1879), 127 Mass. 386.

<sup>4</sup> Cf. *Gould v. Robson* (1807), 8 East, 576; *Petty v. Cooke* (1871), 6 L. R. Q. B. at 794; *Okie v. Spencer* (1836), 2 Whart. (Pa.), 253; *Neurcomb v. Raynor* (1839), 21 Wend. (N. Y.) 108.

<sup>5</sup> *Muir v. Crawford* (1875), 2 L. R. Sc. Ap. 456, H. L.; *Kenworthy v. Sawyer* (1878), 125 Mass. 28; *Pannell v. M'Mechen* (1819), 4 Har. & J. 474.

Act. The drawer and indorsers are only discharged to the extent of the sum received by the holder, for the acceptor is discharged by operation of law.<sup>1</sup>

Discharge of surety by certain dealings with principal.

4. The holder of a dishonored bill enters into a binding agreement<sup>2</sup> to give time to the first indorser. This discharges the subsequent indorsers, but not the drawer or acceptor.<sup>3</sup> But if any indorser consent to the extension of time,<sup>4</sup> or holder expressly reserves his rights against him, he will not be discharged.<sup>5</sup>

5. C. is the holder of a note for \$200, signed by B. and X. C., knowing that X. signed merely to accommodate B. and as surety for him, delivers up to B. a colt worth \$100, pledged as security. X. is thereby discharged to the value of the security.<sup>6</sup>

6. C. is the holder of a joint and several note made by B. and X. X. signed merely to accommodate B., and as surety for him. C., knowing this, agrees for a consideration to give time to B. X. is thereby discharged.<sup>7</sup>

<sup>1</sup> *Re Jacobs* (1875), 10 L. R. Ch. 211; *Cf. Yglesias v. Bank* (1877), 3 L. R. C. P. D. 60; *Guild v. Butler* (1877), 122 Mass. 498; *Burrill v. Smith* (1828), 7 Pick. (Mass.) 291. But see *Re McDonald* (1876), 14 Bank Reg. 477; *Phelps v. Borland* (1886), 103 N. Y. 406.

<sup>2</sup> Must be on valid consideration, *M'Lemore v. Powell* (1827), 12 Wheat. (U. S.) 554; *Brooks v. Allen* (1878), 62 Ind. 401; *Irvine v. Adams* (1879), 48 Wis. 469, and for a definite time, *Ward v. Wick* (1867), 17 O. St. 159; *Hamilton v. Prouty* (1880), 50 Wis. 592; *Prather v. Young* (1879), 67 Ind. 480, and not mere delay in suing, though injurious, *Carpenter v. McLaughlin* (1879), 12 R. I. 270; *Converse v. Cook* (1884), 81 Hun (N. Y.), 417; *Powers v. Silberstein* (1885), 51 Super. Ct. J. & S. (N. Y.) 321 (accommodation indorser).

<sup>3</sup> *Claridge v. Dalton* (1815), 4 M. & S. at 232; *Hall v. Cole* (1836), 4 A. & E. 577; *Cf. Fawcett v. Freshwater* (1877), 31 O. St. 637; *Thompson v. Bourne* (1876), 39 N. J. L. 2; *Hopkins v. Gray* (1879), 51 Ia. 340; *Greene v. Bates* (1878), 74 N. Y. 333; *Pratt v. Hedden* (1876), 121 Mass. 116.

<sup>4</sup> *Gloucester Bank v. Worcester* (1830), 10 Pick. (Mass.), 528; *Trent v. Smith* (1866), 54 Me. 112; *Baldwin v. Bank* (1831), 5 O. 273; *Bowling v. Flood* (1878), 1 Lea (Tenn.), 678. But see *Broadway Bank v. Schmucker* (1879), 7 Mo. Ap. 171, holding principle not applicable to a release of indorser.

<sup>5</sup> *Clagett v. Salmon* (1833), 5 Gill & J. (Md.) 314; *Hagey v. Hill* (1874), 75 Pa. St. 108; *Cf. Paine v. Voorhees* (1870), 20 Wis. 522.

<sup>6</sup> *Kirkpatrick v. Howk* (1875), 80 Ill. 122; *Guild v. Butler* (1879), 127 Mass. 386; *Ives v. Bank* (1864), 12 Mich. 361; *Holland v. Johnson* (1875), 51 Ind. 346; *Cf. Union Bank v. Cooley* (1875), 27 La. An. 202; *Bonney v. Bonney* (1870), 29 Ia. at 452; *Dunn v. Parsons* (1886), 40 Hun (N. Y.), 77. Unless surrendered with X.'s consent, *Pence v. Gale* (1873), 20 Minn. 257.

<sup>7</sup> *Greenough v. McClelland* (1867), 80 L. J. Q. B. 15, Ex. Ch.; *Barron v. Cady* (1879), 40 Mich. 259; *Wheat v. Kendall* (1834), 6 N. H.

Discharge of  
surety by cer-  
tain dealings  
with principal.

7. C. is the holder of a joint and several note made by B. and X. C. knows that X. signed as surety to accommodate B. B. pays C. It turns out afterwards that this payment was a fraudulent preference. C. refunds the money to B.'s trustees. X. is not discharged by B.'s payment.<sup>1</sup>

8. A bill is accepted for the accommodation of the drawer. After it is due the holder is informed of this and then agrees to give time to the drawer. The acceptor is discharged.<sup>2</sup>

9. A bill drawn by A. and accepted by B. is discounted with C. C. subsequently discovers that the bill was drawn and accepted for the accommodation of X., who is not a party to the bill, but who is to provide for it. C. then enters into an agreement to give time to X. This discharges the acceptor of the bill.<sup>3</sup>

10. A note is made by a corporation and is indorsed by three directors in succession. It appears that they all agreed to indorse the note to guarantee the company's debt. They are liable *inter se* as co-sureties, and not in succession according to the order of their indorsements.<sup>4</sup>

NOTE.—As regards the particular dealings with a principal which discharge the surety, there is no difference between an ordinary surety and a surety on a bill, so it would be useless to multiply illustrations. In *Farmers' Bank v. Rathbone* (1852),<sup>5</sup> it was held that the holder has a right to treat all the parties to a bill exactly as they appear on the instrument, and hence if he discharges the drawer, the acceptor is not thereby released, though the holder knew the bill to have been accepted for the drawer's accommodation; and that this was the rule in equity as well as at law. This harsh doctrine giving the holder the absolute right to treat parties according to their ostensible po-

504; Cf. *Guild v. Butler* (1879), 127 Mass. 386; *McCloskey v. Ind. Union* (1879), 67 Ind. 86; *Rose v. Williams* (1870), 5 Kans. 483.

<sup>1</sup> *Petty v. Cooke* (1871), 6 L. R. Q. B. 790; Cf. *Watson v. Poague* (1876), 42 Ia. 582.

<sup>2</sup> *Ewin v. Lancaster* (1865), 6 B. & S. 571; *Meggett v. Brum* (1879), 57 Miss. 22; Cf. *Re Goodwin* (1879), 5 Dillon (C. Ct.), 140; *Valley Bank v. Meyers*, 17 Bank. Reg. 257; *Parks v. Ingram* (1851), 2 Fost. (N. H.), 233. *Contra, Farmers' & M. Bank v. Rathbone* (1852), 26 Vt. 19.

<sup>3</sup> *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. 142; affirmed (1874), 7 L. R. H. L. 348.

<sup>4</sup> *Macdonald v. Whitfield*, (1883), 8 App. Cas. 733, P. C.; as to admissibility of parol evidence to explain the transaction, see at p. 748.

<sup>5</sup> 26 Vt. 19. See, also, *Bank v. Walker* (1823), 9 S. & R. (Pa.) 229; *Murray v. Judah* (1826), 6 Cow. (N. Y.) 484.

sition on the bill, though in so doing he violate equities of which he is well aware, was finally established in England as the rule of law,<sup>1</sup> but the contrary is the well settled doctrine in equity both in England and America, as shown by the cases cited *supra*. Clearly, such is the case where the bill was taken by the holder with the understanding that the apparent principal should be regarded according to his real position as surety.<sup>2</sup> The authorities are uniform in applying this equitable principle to cases where a surety signs a note as joint maker.<sup>3</sup>

### Alterations.

Art. 246. "Issue" means the first delivery of a bill to a person who takes it as a holder for value and thereby acquires the right to enforce payment thereof.<sup>4</sup>

### ILLUSTRATIONS.

1. A. draws a bill on B., payable to his own order. B. accepts the bill for value and returns it to A. The bill is issued.<sup>5</sup>
2. A. draws, B. accepts, and C. indorses a bill payable to D. or order for D.'s accommodation. The bill while in D.'s hands is not issued, but if D. indorses and discounts it with E. it is issued.<sup>6</sup>

NOTE.—In England, under the provisions of the Stamp Act, the question as to when a bill has been issued is important, for a material alteration *after* issue avoids the bill entirely, and it is of no validity against a party who consents to the alteration, since it is a new bill and must be re-stamped. But if altered *before* issue, it is valid against parties who consent to the alteration.<sup>7</sup> In America this question as to issue is not material. See Art. 248 and Art. 219, n.

<sup>1</sup> *Fentum v. Pocock* (1813), 5 Taunt. 192; *Harrison v. Courtauld* (1832), 8 B. & Ad. 37.

<sup>2</sup> *Stillwell v. Aaron* (1879), 69 Mo. 539.

<sup>3</sup> *Wheat v. Kendall* (1834), 6 N. H. 504; Cf. *Colgrove v. Tallman* (1876), 67 N. Y. 95; *Millard v. Thorn* (1874), 56 N. Y. 402.

<sup>4</sup> Cf. *Ex parte Bignold* (1836), 1 Deac. at 735.

<sup>5</sup> *Cardwell v. Martin* (1808), 9 East, 190; *Bathe v. Taylor* (1812), 15 East, 412; Cf. *Kennerly v. Nash* (1816), 1 Stark. 452.

<sup>6</sup> *Downes v. Richardson* (1822), 5 B. & Ald. 674; Cf. *Tarleton v. Shingler* (1849), 7 C. B. 812; *Whitworth v. Adams* (1827), 5 Rand. (Va.) at 342.

<sup>7</sup> *Webber v. Maddocks* (1811), 3 Camp. 1; *Kennerly v. Nash* (1816), 1 Stark. 452; *Downes v. Richardson* (1822), 5 B. & Ald. 674; *Sherrington*

Material alteration defined.

Art. 247. An alteration is material which in any way alters the operation of a bill and the liabilities of the parties as originally fixed thereby, whether the change be prejudicial or beneficial.<sup>1</sup>

#### ILLUSTRATIONS.

##### 1. The following are material:—

A particular consideration is substituted for the words value received;<sup>2</sup> or the date of a bill payable at a fixed period after date is altered, and the time of payment thereby postponed<sup>3</sup> or accelerated;<sup>4</sup> or the date of a check is altered;<sup>5</sup> or a bill payable three months after date is converted into a bill payable three months after sight;<sup>6</sup> or the sum payable is altered, *e. g.* from \$105 to \$100;<sup>7</sup> or the specified rate of interest is altered, *e. g.* from 3 per cent. to 2½ per cent.;<sup>8</sup> or a bill payable "with lawful interest" is altered by adding the words "interest at 6 per cent.;"<sup>9</sup> or "with interest" is added to a bill silent as to interest;<sup>10</sup> or a non-negoti-

*v. Jermyn* (1828), 3 C. & P. 374; See, too, *Hamelin v. Bruck* (1846), 9 Q. B. 306.

<sup>1</sup> *Gardner v. Walsh* (1855), 5 E. & B. 83 at 89; *Chism v. Toomer* (1871), 27 Ark. 108; *Franklin Ins. Co. v. Courtney* (1877), 60 Ind. 134. Or per Brett, L. J., "which would alter the business effect of the instrument if used for any business purpose;" *Suffell v. Bank of England* (1882), 9 Q. B. D. 555, at p. 568; see the test suggested by Cotton, L. J., at pp. 574-575. Materiality is a question of law. *Vance v. Lowther* (1876), 1 L. R. Ex. D. 176; *Stephens v. Graham* (1822), 9 S. & R. (Pa.) 505; *Cochran v. Nebeker* (1874), 48 Ind. 460; *Palmer v. Sargent* (1876), 5 Neb. 223.

<sup>2</sup> *Knill v. Williams* (1809), 10 East, 431; Cf. *Wright v. Inshaw* (1842), 1 D. N. S. 802. But see *Daniel*, § 1394.

<sup>3</sup> *Outhwaite v. Luntly* (1815), 4 Camp. 179; *Hirschman v. Budd* (1873), 8 L. R. Ex. 171; *Wood v. Steele* (1867), 6 Wall. (U. S.) 80; *Britton v. Dierker* (1870), 46 Mo. 591; *Rogers v. Vosburgh* (1881), 87 N. Y. 228.

<sup>4</sup> *Master v. Miller* (1793), 2 H. Bl. 130, Ex. Ch.; *Walton v. Hastings* (1815), 4 Camp. 223; *Brown v. Straw* (1877), 6 Neb. 536.

<sup>5</sup> *Crawford v. West Side Bank* (1885), 100 N. Y. 50.

<sup>6</sup> *Long v. Moore* (1799), 3 Esp. 155, n.

<sup>7</sup> Cf. *Hamelin v. Bruck* (1846), 9 Q. B. 306; *Savings Bank v. Shaffer* (1879), 9 Neb. 1. But see *Woolfolk v. Bank* (1874), 10 Bush. (Ky.) 504; *Schryver v. Hawkes* (1872), 22 O. St. 308; *Smith v. Smith* (1850), 1 R. I. 398.

<sup>8</sup> *Sutton v. Toomer* (1827), 7 B. & C. 416; Cf. *Moore v. Hutchinson* (1879), 69 Mo. 429; *Schneewind v. Hacket* (1876), 54 Ind. 248; *Haish v. Klepper* (1876), 28 O. St. 200.

<sup>9</sup> *Warrington v. Early* (1853), 23 L. J. Q. B. 47; Cf. *Ivory v. Michael* (1863), 33 Mo. 398; *Brooks v. Allen* (1878), 62 Ind. 401.

<sup>10</sup> *Bradley v. Mann* (1877), 37 Mich. 1; *Schwarz v. Oppold* (1878), 74 N. Y. 307; *Lamar v. Brown* (1876), 56 Ala. 235.

able bill is made negotiable;<sup>1</sup> or a bill payable to "C. or order" is changed to "C. or bearer;"<sup>2</sup> or a particular rate of exchange is indorsed on a bill which does not authorize this to be done;<sup>3</sup> or a joint note is converted into a joint and several note;<sup>4</sup> or a new maker is added to a joint and several note;<sup>5</sup> or the name of a maker of a joint and several note is cut off;<sup>6</sup> or intentionally erased;<sup>7</sup> or a material memorandum is cut off or erased;<sup>8</sup> or a clause is added, waiving appraisal and exemption laws;<sup>9</sup> or the place of payment is altered, *e. g.* a bill is accepted payable at X. & Co.'s, and, Y. & Co. is substituted for X. & Co.;<sup>10</sup> or a place of payment is added *without* the acceptor's consent.<sup>11</sup>

<sup>1</sup> *Bruce v. Westcott* (1848), 3 Barb. (N. Y.) 374; *Johnson v. Bank* (1842), 2 B. Mon. (Ky.) 310; *State v. Stratton* (1869), 27 Ia. 420; *Cf. Weyerhauser v. Dun* (1885), 100 N. Y. 150 (rate after maturity).

<sup>2</sup> *Union Bank v. Roberts* (1878), 45 Wis. 373. But *Cf. Flint v. Craig* (1871), 59 Barb. (N. Y.) 319.

<sup>3</sup> *Hirschfield v. Smith* (1866), 1 L. R. C. P. 340. *Cf. Art. 13.*

<sup>4</sup> *Perring v. Hone* (1826), 4 Bing. 28; *Draper v. Wood* (1873), 112 Mass. 315.

<sup>5</sup> *Gardner v. Walsh* (1855), 5 E. & B. 83; *Cf. Clerk v. Blackstock* (1816), Holt N. P. 474; *Humphreys v. Guillow* (1843), 13 N. H. 385; *Lunt v. Silver* (1878), 5 Mo. Ap. 186; *Hamilton v. Hooper* (1877), 46 Ia. 515; *Whitmore v. Nickerson* (1878), 125 Mass. 496; *Crandall v. First Nat. Bank* (1878), 61 Ind. 349 (surety added), but see *Miller v. Finley* (1872), 26 Mich. 249; *Aldrich v. Smith* (1877), 37 Mich. 468 (payee added). But see *Wallace v. Jewell* (1871), 21 O. St. 163.

<sup>6</sup> *Cf. Mason v. Bradley* (1843), 11 M. & W. 590; *Gillett v. Sweet* (1844), 1 Gilm. (Ill.) 475; *Hall v. McHenry* (1865), 19 Ia. 522.

<sup>7</sup> *Nicholson v. Revill* (1836), 4 A. & E. 675; *Cf. McCramer v. Thompson* (1863), 21 Ia. 244 (surety); *Stoddard v. Penniman* (1871), 108 Mass. 366.

<sup>8</sup> *Benedict v. Conden* (1872), 49 N. Y. 396; *Wheelock v. Freeman* (1832), 13 Pick. (Mass.) 165; *Johnson v. Heagan* (1843), 23 Me. 329; *Wait v. Pomeroy* (1870), 20 Mich. 425; *Palmer v. Sargent* (1876), 5 Neb. 223; *Gerrish v. Clines* (1875), 56 N. H. 9.

<sup>9</sup> *Holland v. Hatch* (1858), 11 Ind. 497; *Cf. Taddiken v. Cantrell* (1877), 69 N. Y. 597; *Robinson v. Reed* (1877), 46 Ia. 219. But see *Holland v. Hatch* (1864), 15 O. St. 464.

<sup>10</sup> *Tidmarsh v. Grover* (1813), 1 M. & S. 735; *Cf. Nazro v. Fuller* (1840), 24 Wend. (N. Y.) 374. But see *American Bank v. Bangs* (1868), 42 Mo. 450.

<sup>11</sup> *Calvert v. Baker* (1838), 4 M. & W. 417; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Whitesides v. Bank* (1874), 10 Bush (Ky.) 501; *McCoy v. Lockwood* (1880), 71 Ind. 319; *Cf. Hanbury v. Loret* (1868), 18 L. T. N. S. 366; *Toomer v. Rutland* (1876), 57 Ala. 379; *Townsend v. Star Co.* (1880), 10 Neb. 615. *Qu.* if acceptor consent, *Walter v. Cubley* (1833), 2 Cr. & M. 151, and *Cf. Mason v. Bradley*, *supra.* at 594; but see *Gibbs v. Mather* (1832), 2 Cr. & J. at 262; *Saul v. Jones* (1858), 28 L. J. Q. B. 37, which show that the position of drawer and indorser is altered.



Material alteration defined.

2. The following are immaterial:—

A bill payable to C. or bearer is converted into a bill payable to C. or order;<sup>1</sup> or “or bearer” is added to the name of the payee of a note payable on a contingency;<sup>2</sup> or an indorsement in blank is converted into a special indorsement;<sup>3</sup> or the words “on demand” are added to a note in which no time of payment is expressed;<sup>4</sup> or a bill addressed to B. and X., under the style of “B., X. and Co.,” is accepted by them as “B. and X.,” and the address is afterwards altered to “B. and X.” to make it correspond with the acceptance;<sup>5</sup> or an erroneous “due date” is added to a bill;<sup>6</sup> or a rate of interest void for usury is inserted;<sup>7</sup> or the *descriptio personæ* is erased from the signature of a bill, e. g. “B., Trustee of the X. Church.”<sup>8</sup>

Effect of alteration on bill.

Art. 248. A material alteration by the holder of a bill, discharges all parties who do not consent thereto, from liability on the bill.<sup>9</sup>

#### ILLUSTRATIONS.

1. C., the holder of a note, makes an immaterial alteration. This in no way affects the right of C. or any subsequent holder to recover on the note, though the alteration was fraudulently made.<sup>10</sup>

2. C. makes a material alteration, e. g. adds “with interest” to the bill, believing the added stipulation was omitted by mistake. C. cannot maintain suit against any one on the bill,

<sup>1</sup> *Attwood v. Griffin* (1826), 2 C. & P. 368. *Sed qu.*

<sup>2</sup> *Goodenow v. Curtis* (1876), 33 Mich. 505.

<sup>3</sup> See Art. 118.

<sup>4</sup> *Aldous v. Cornwall* (1868), 3 L. R. Q. B. 573; Cf. Art. 18.

<sup>5</sup> *Farguar v. Southey* (1826), M. & M. 14; *Arnold v. Jones* (1852), 2 R. I. 345; Cf. *Smith v. Lockridge* (1871), 8 Bush (Ky.), 425; Art. 37.

<sup>6</sup> *Fanshawe v. Peat* (1857), 26 L. J. Ex. 314.

<sup>7</sup> *Patton v. Shanklin* (1853), 14 B. Mon. (Ky.) 15; Cf. *Cotton v. Simpson* (1838), 8 A. & E. 136; *Leonard v. Phillips* (1878), 39 Mich. 182, (“annually” added to note payable “with interest”).

<sup>8</sup> *Hayes v. Brubaker* (1878), 65 Ind. 27; *Burlingame v. Brewster* (1875), 79 Ill. 515; *McGuinness v. Bligh* (1874), 11 R. I. 94.

<sup>9</sup> *Master v. Miller* (1793), 2 H. Bl. 130 Ex. Ch., 1 Smith, L. C., 7th ed. 871, and notes; *Wade v. Withington* (1861), 1 Allen (Mass.), at 562.

<sup>10</sup> *Burlingame v. Brewster* (1875), 79 Ill. 515; *Moye v. Herndon* (1855), 80 Miss. 110; Cf. *Miller v. Finley* (1872), 26 Mich. 249; *Commonwealth v. Bank* (1867), 98 Mass. 12.

either as altered<sup>1</sup> or as it was before alteration,<sup>2</sup> unless the defendant authorized or assented to the alteration, *e. g.* by part payment with knowledge of the alteration.<sup>3</sup> Effect of alteration on bill.

3. C., the payee of a note for \$10, alters it into a note for \$110, and transfers it to D., who takes it for value and without notice of the alteration. D. cannot recover of the maker, although there was nothing in the appearance of the note to excite suspicion, and the negligence of the maker in leaving blank spaces afforded the opportunity for the fraud.<sup>4</sup>

4. X. indorses for the accommodation of B. a note made by him payable to C. Before its issue B. makes a material alteration, *e. g.* inserts X.'s name as payee also, and delivers the note to C. X. is discharged, and B. is liable as sole maker.<sup>5</sup> But if X. afterwards assent to the alteration, he is liable.<sup>6</sup>

5. B. executes a note payable to C. and delivers it to X., who is C.'s agent. X., without authority, makes a material alteration before delivering it to C. B. is not discharged. The alteration was the act of a stranger (spoliation), and of no effect.<sup>7</sup>

<sup>1</sup> *Fay v. Smith* (1861), 1 Allen (Mass.), 477; *Cf. Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Bradley v. Mann* (1877), 37 Mich. 1; *Moore v. Hutchinson* (1879), 69 Mo. 429; *Coburn v. Webb* (1877), 56 Ind. 96.

<sup>2</sup> *Citizens' Bank v. Richmond* (1876), 121 Mass. 110. *Contra, Worrall v. Gheen* (1861), 39 Pa. St. 388; *Myers v. Nell* (1877), 84 Pa. St. 369 at 373.

<sup>3</sup> *Evans v. Foreman* (1875), 60 Mo. 449; *Goodspeed v. Cutler* (1874), 75 Ill. 534; *Stoddard v. Penniman* (1873), 113 Mass. 386; *Stewart v. Bank* (1879), 40 Mich. 348. *Aliter*, in England under Stamp Act, see Arts. 219, n. and 246, n.

<sup>4</sup> *Greenfield Bank v. Stowell* (1877), 123 Mass. 196; *Holmes v. Trumper* (1871), 22 Mich. 427; *Knoxville Bank v. Clark* (1879), 51 Ia. 284. *Contra, Brown v. Reed* (1875), 79 Pa. St. 370; *Seibel v. Vaughan* (1873), 69 Ill. 257; *Capital Bank v. Armstrong* (1876), 62 Mo. 59, at 67, 68; *Cornell v. Nebeker* (1877), 58 Ind. 425.

<sup>5</sup> *Aldrich v. Smith* (1877), 37 Mich. 468; *Hamilton v. Hooper* (1877), 46 Ia. 515; *Draper v. Wood* (1873), 112 Mass. 315; *Wood v. Steele* (1867), 6 Wall. (U. S.) 80.

<sup>6</sup> Even in England, as the bill had not been issued, and required no new stamp, *Webber v. Maddocks* (1811), 3 Camp. 1; *Kennerly v. Nash* (1816), 1 Stark. 452; *Downes v. Richardson* (1822), 5 B. & Ald. 674; *Sherrington v. Jermyn* (1828), 3 C. & P. 374; *Wright v. Inshaw* (1842), 1 D. N. S. 802. Art. 246 and note.

<sup>7</sup> *Brooks v. Allen* (1878), 62 Ind. 401; *Langenberger v. Kroeger* (1874), 48 Cal. 147; *U. S. v. Spalding* (1822), 2 Mason (C. Ct.) at 482, Story, J.; *Gorden v. Robertson* (1879), 48 Wis. 493; *Dinsmore v. Duncan* (1874), 57 N. Y. at 581. *Contra*, in England, *Davidson v. Cooper* (1843), 11 M. & W. at 799, affirmed (1844), 13 M. & W. 343.

Effect of alteration on bill.

*Exception 1.*—If an altered bill is restored to its original form, and transferred to a *bona fide* holder, he may recover against all parties thereon.<sup>1</sup>

*Exception 2.*—A bill may at any time be altered for the purpose of correcting a mistake,<sup>2</sup> and bringing the instrument into accordance with the intention of the parties at the time of issue.<sup>3</sup>

#### ILLUSTRATION.

A bill payable after date is wrongly dated,<sup>4</sup> or a note intended to be negotiable is made payable to C. simply, the words "or order" being omitted.<sup>5</sup> The mistake may be corrected after the bill has been negotiated.

NOTE.—The court in the exercise of its equitable jurisdiction has power to rectify a bill which does not express the intention of the parties,<sup>6</sup> just as it can do so in the case of any other contract. It will be noticed that in America the indorser of an altered bill is liable, as such, to any subsequent holder, but that in England it may be otherwise under the Stamp Act. See Art. 219, n.

Effect of alteration on consideration.

Art. 249. The holder of a bill which has been avoided by a material alteration cannot sue on the consideration in respect of which it was negotiated to him.<sup>7</sup>

<sup>1</sup> *Shepard v. Whetstone* (1879), 51 Ia. 457; *Horst v. Wagner* (1876), 43 Ia. 373; *Kountz v. Kennedy* (1869), 63 Pa. St. 187; Cf. *Robinson v. Reed* (1877), 46 Ia. 219; *Whitmore v. Nickerson* (1878), 125 Mass. 496. But see *Citizens' Bank v. Richmond* (1876), 121 Mass. 110.

<sup>2</sup> Cf. *Knill v. Williams* (1809), 10 East, 431; *Ex parte White* (1833), 2 Deac. & Ch. at 258, 359; *Hamelin v. Bruck* (1846), 9 Q. B. at 310; *London Bank v. Roberts* (1874), 22 W. R. 402; *Ames v. Colburn* (1858), 11 Gray (Mass.), 390; *McRaven v. Crisler* (1876), 53 Miss. 542; *Booth v. Powers* (1874), 56 N. Y. 22.

<sup>3</sup> *Bradley v. Bardsley* (1845), 14 M. & W. 873; Cf. *Bank of Metropolis v. Bank* (1855), 13 N. Y. 309.

<sup>4</sup> *Brutt v. Picard* (1824), R. & M. 37. But see *Miller v. Gilleland* (1852), 19 Pa. St. 119.

<sup>5</sup> *Kershaw v. Cox* (1800), 3 Esp. 246; *Byrom v. Thompson* (1839), 11 A. & E. 31; *Cariss v. Tattersall* (1841), 2 M. & Gr. 390; Cf. Art. 107.

<sup>6</sup> *Druff v. Parker* (1868), 4 L. R. Eq. 131.

<sup>7</sup> *Alderson v. Langdale* (1832), 3 B. & Ad. 660; *Wheelock v. Freeman* (1832), 13 Pick. (Mass.) 165; *Meyer v. Huneke* (1874), 55 N. Y. 412; *Vegle v. Ripper* (1864), 34 Ill. 100; *Smith v. Mace* (1863), 44 N. H. 553.

*Exception 1.*—If the bill was negotiated to him after the alteration was made, and he was not privy to the alteration, he may sue on the consideration.<sup>1</sup> Effect of alteration on consideration.

*Exception 2.*—If the holder was privy to the alteration, he can still recover provided (a) that he did not intend to commit a fraud by the alteration,<sup>2</sup> and (b) that the party sued would not have had any remedy over on the bill, if it had not been altered.

#### ILLUSTRATIONS.

1. A. sells goods to B., and draws a bill on him for the price, payable to his own order. B. accepts. A., intending no fraud, makes a material alteration of the bill. A. can sue B. for the price of the goods though no action could be brought on the bill.<sup>3</sup>

2. C. sells goods to A., who draws a bill on B. for the price, and indorses it to C. B. accepts. C., intending no fraud, makes a material alteration of the bill. C. cannot sue A. for the price of the goods, for the alteration has deprived A. of his remedy on the bill against B.<sup>4</sup>

Art. 250. Where a bill appears to have been altered, or there are marks of erasure on it, the party seeking to enforce the instrument is bound to give evidence to show that it is not avoided thereby.<sup>5</sup> Cf. Art. 138. Onus probandi as to alteration.

<sup>1</sup> *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; Cf. *Cundy v. Marriott* (1831), 1 B. & Ad. 696. And, also, on the bill, *vide supra*.

<sup>2</sup> *Hunt v. Gray* (1871), 35 N. J. L. 227; *Clough v. Seay* (1878), 49 Ia. 111; *Savings Bank v. Shaffer* (1879), 9 Neb. 1.

<sup>3</sup> *Atkinson v. Hawdon* (1835), 2 A. & E. 628; *Clute v. Small* (1837), 17 Wend. (N. Y.) 238; Cf. *Sutton v. Toomer* (1827), 7 B. & C. 416, and *Merrick v. Bourry* (1854), 4 O. St. 60 (payee against maker of note).

<sup>4</sup> *Alderson v. Langdale* (1832), 3 B. & Ad. 660; see by way of analogy the effect at common law of the loss of a bill, *Crowe v. Clay* (1854), 9 Exch. 604.

<sup>5</sup> *Knight v. Clements* (1838), 8 A. & E. 215; *Clifford v. Parker* (1841), 2 M. & Gr. 909; *Wilde v. Armsby* (1850), 6 Cush. (Mass.) 314; *Simpson v. Stackhouse* (1848), 9 Pa. St. 186; *Willett v. Shepard* (1876), 24 Mich. 106; *Page v. Danaher* (1877), 43 Wis. 221; *Gillett v. Sweat* (1844), 1 Gilm. (Ill.) 475; *Chism v. Toomer* (1871), 27 Ark. 108; Cf. *Totum v. Catomore* (1851), 16 Q. B. at 746; see *e. g.*, *Cariss v. Tattersall* (1841),

*Renewal.*Effect of re-  
newal.

Art. 251. When a bill is given in renewal of a former bill, and the holder retains such former bill, the renewal, in the absence of special agreement,<sup>1</sup> operates merely as a conditional payment thereof. If the renewed bill be paid in due course or otherwise discharged, the original bill is likewise discharged;<sup>2</sup> but if the renewed bill be dishonored, then, subject to Art. 245, the liabilities of the parties to the original bill revive and they may be sued thereon.<sup>3</sup>

NOTE.—When there is an agreement to renew, the application for renewal must be made within a reasonable time of the maturity of the original bill, but it need not be made before its maturity.<sup>4</sup> When the holder of a renewed bill could not have maintained an action on the original bill because there was no consideration for it,<sup>5</sup> or the consideration was illegal,<sup>6</sup> or because he was privy to some fraud connected therewith,<sup>7</sup> he cannot sue on the renewed bill.<sup>8</sup>

2 M. & Gr. 890, as to what evidence suffices. But see *Paramore v. Lindsey* (1876), 63 Mo. 63; *Jones v. Ireland* (1856), 4 Ia. 63. at 71; *Corcoran v. Doll* (1867), 32 Cal. 82; *Huntington v. Finch* (1854), 3 O. St. 445; *Meikel v. Sav. Inst.* (1871), 36 Ind. 355.

<sup>1</sup> Cf. *Lewis v. Lyster* (1835), 2 C. M. & R. 704; *Lumley v. Musgrave* (1837), 4 Bing. N. C. at 15; *Arnold v. Camp* (1815), 12 Johns. (N. Y.) 409; *Wilbur v. Jernegan* (1875), 11 R. I. 133; *Archibald v. Argall* (1870), 53 Ill. 307.

<sup>2</sup> *Dillon v. Rimmer* (1822), 1 Bing. 100; Cf. *Soward v. Palmer* (1818), 2 Moore, 274; *Lumley v. Hudson* (1837), 4 Bing. N. C. 15.

<sup>3</sup> *Ex parte Barclay* (1802), 7 Ves. Jr. 597; *Norris v. Aylett* (1809), 2 Camp. 329; Cf. *Kendrick v. Lomax* (1832), 2 Cr. & J. 405; *Sloman v. Cox* (1834), 1 C. M. & R. at 472; *Welch v. Allington* (1863), 23 Cal. 322; *First Nat. Bank v. Morgan* (1876), 6 Hun (N. Y.) 346. But see *Cornwall v. Gould* (1827), 4 Pick. (Mass.) 444, and next note.

<sup>4</sup> *Maillard v. Page* (1870), 5 L. R. Ex. 312; Cf. *Innes v. Munros* (1847), 1 Exch. 473; *Torrance v. Bank* (1874), 5 L. R. P. C. 246, as to construction of agreements to renew.

<sup>5</sup> *Southall v. Rigg* (1851), 11 C. B. 481; *Hill v. Buckminster* (1827), 5 Pick. (Mass.) 391; *Copp v. Sawyer* (1833), 6 N. H. 386.

<sup>6</sup> *Chapman v. Black* (1819), 2 B. & Ald. 588; *Hay v. Ayling* (1851), 16 Q. B. 423; *Holden v. Cosgrove* (1858), 12 Gray (Mass.), 216; *Nat. Bank v. Eyre* (1879), 52 Ia. 114; *Gates v. Union Bank* (1873), 12 Heisk. (Tenn.) 325.

<sup>7</sup> *Lee v. Zagury* (1817), 8 Taunt. 114; *Sawyer v. Wiswell* (1864), 9 Allen (Mass.), 38.

<sup>8</sup> See, however, two apparent but not real exceptions, *Mather v. Maidstone* (1855), 18 C. B. 273; *Flight v. Reed* (1863), 1 H. & C. 703.

*Bill as Payment.*—A bill given in renewal of another bill operates in the same way as a bill given in respect of any other debt. The ordinary effect of giving a bill is that the remedy for the debt is suspended until the dishonor of the bill.<sup>1</sup> The bill operates as conditional payment, the condition being that the debt revives if the bill cannot be realized.<sup>2</sup> It is immaterial whether the bill be payable on demand or *in futuro*.<sup>3</sup> But the contrary presumption, that a negotiable bill or note is received in extinguishment and satisfaction of a pre-existing debt, prevails in Maine, Massachusetts and Vermont.<sup>4</sup> In France in the absence of special agreement the renewal of a bill extinguishes the original bill by *novatio*.<sup>5</sup> Payment of a smaller sum in money does not discharge an undisputed debt for a larger sum,<sup>6</sup> but if the acceptance of a third person be taken in satisfaction of a debt for a larger sum, it is a good discharge,<sup>7</sup> and, possibly, the check of the debtor himself for a smaller sum may, if so taken, operate as satisfaction.<sup>8</sup> A check which is afterwards stopped is wholly inoperative.<sup>10</sup>

<sup>1</sup> *Jagger Iron Co. v. Walker* (1879), 76 N. Y. 521.

<sup>2</sup> *Haines v. Pearce* (1874), 41 Md. 221; *Huss v. McDaniel* (1871), 33 Ia. 406; *Griffith v. Grogan* (1859), 12 Cal. 317; *Stevens v. Park* (1874), 73 Ill. 387, and *Kermeyer v. Newby* (1875), 14 Kans. 164 (check).

<sup>3</sup> *Currie v. Misa* (1875), 10 L. R. Ex. at 163, 164, Ex. Ch.

<sup>4</sup> But see *Alcock v. Hopkins* (1850), 6 Cush. (Mass.) 484.

<sup>5</sup> *Fowler v. Bush* (1838), 21 Pick. (Mass.) 230; *Appleton v. Parker* (1860), 15 Gray (Mass.), 173; *Varner v. Nobleborough* (1822), 2 Greenl. (Me.) 121; *Stephens v. Thompson* (1855), 28 Vt. 77. *Aliter*, in case of checks, *Marrett v. Brackett* (1872), 60 Me. 524; *Weddigen v. Boston F. Co.* (1868), 100 Mass. 422.

<sup>6</sup> *Nouguier*, §§ 1032-1042.

<sup>7</sup> *Foakes v. Beer* (1884), L. R. 9 App. Cas. 605, H. L.

<sup>8</sup> *Curlewis v. Clark* (1849), 3 Exch. 375.

<sup>9</sup> *Goddard v. O'Brien* (1882), L. R. 9 Q. B. D. 37, distinguished in *Foakes v. Beer*, *supra* at p. 613.

<sup>10</sup> *Cohen v. Hale* (1878), L. R. 3 Q. B. D. 371.

## CHAPTER VIII.

### LIMITATIONS.

Limitation,  
how computed  
against the  
several parties.

Art. 252. Subject to Arts. 191 and 253, no action on a bill can be maintained against any party thereto after the expiration of six years from the time when a cause of action first accrued to the *then* holder against such party.<sup>1</sup>

### ILLUSTRATION.

C. is the holder of a dishonored bill. Three years after the dishonor he indorses the bill to D. D. must sue the acceptor within the next three years, though he has six years within which he may sue C.

*Explanation 1.*—As regards the acceptor, time begins to run from the maturity of the bill, unless—

- (1.) Presentment for payment is necessary in order to charge the acceptor, in which case time (probably) runs from the date of such presentment;<sup>2</sup> or
- (2.) The bill is accepted after its maturity, in which case time (probably) runs from the date of acceptance.<sup>3</sup>

### ILLUSTRATIONS.

1. Bill payable *in futuro*, e. g., three months after date or

<sup>1</sup> Cf. 21 Jac. 1. c. 16; *Whitehead v. Walker* (1842), 9 M. & W. 506; *Woodruff v. Moore* (1850), 8 Barb. (N. Y.) 171.

<sup>2</sup> *Picquet v. Curtis* (1833), 1 Sumn. (C. Ct.) 478; Cf. Art. 172.

<sup>3</sup> Cf. Art. 34.

sight. Time runs in favor of the acceptor from the day the bill is payable, not from the day the acceptance is given.<sup>1</sup>

Limitation,  
how computed  
against the  
several parties

2. B. in 1840 gives a blank acceptance to C. In 1850 it is filled up as a bill payable three months after date, and negotiated to a *bona fide* holder. Time runs in favor of B. from the day the bill was payable.<sup>2</sup>

3. Note payable on demand (with or without interest), and issued on the day it bears date. Time runs in favor of the maker from the date of the note, and not from the date of demand.<sup>3</sup>

4. Note payable on demand, dated January 1, is not issued till July 1. Time runs in favor of the maker from July 1, the day of issue.<sup>4</sup>

5. Note payable three months after demand. Time runs in favor of the maker from the day the bill is payable.<sup>5</sup>

*Explanation 2.*—As regards the drawer or an indorser time (generally) begins to run from the date when notice of dishonor is duly sent.<sup>6</sup>

#### ILLUSTRATIONS.

1. Bill payable ninety days after sight is dishonored by non-acceptance. As regards the drawer time runs against the holder from the dishonor by non-acceptance and notice thereof. If the bill is presented for payment and again dishonored, no fresh cause of action arises.<sup>7</sup>

2. A. draws a bill on B. C. indorses it for A.'s accommodation. The bill is dishonored, and five years after the dishonor,

<sup>1</sup> *Holmes v. Kerrison* (1810), 2 Taunt. 323; Cf. *Fryer v. Roe* (1852), 12 C. B. 437. See Art. 20, computation of time of payment.

<sup>2</sup> *Montague v. Perkins* (1853), 22 L. J. C. P. 187; Cf. Art. 23.

<sup>3</sup> *Norton v. Ellam* (1837), 2 M. & W. 461; *Wheeler v. Warner* (1872), 47 N. Y. 519; *De Lavalette v. Wendt* (1879), 75 N. Y. 579; *Neuman v. Kettelle* (1832), 13 Pick. (Mass.) 418.

<sup>4</sup> *Savage v. Aldren* (1817), 2 Stark. 232; Cf. *Richards v. Richards* (1831), 2 B. & Ad. 447; *Watkins v. Figg* (1863), 11 W. R. 258; *Hill v. Henry* (1848), 17 O. 9.

<sup>5</sup> *Thorpe v. Combes* (1826), 8 D. & R. 347; *Little v. Blunt* (1830), 9 Pick. (Mass.) 488; *Wenman v. Mohawk Ins. Co.* (1835), 13 Wend. (N. Y.) 267; Cf. *Way v. Bassett* (1845), 5 Hare, 55.

<sup>6</sup> Cf. *Shed v. Brett* (1823), 1 Pick. (Mass.) 401; Cf. Art. 189. *Aliter*, in England, see next note.

<sup>7</sup> *Witchhead v. Walker* (1842), 9 M. & W. 506; Cf. *Wood v. McMeans* (1859), 23 Tex. 481.



Limitation,  
how computed  
against the  
several parties.

C., as indorser, is obliged to pay the holder. Two years later (*i. e.*, seven years after the dishonor), C. sues A. on the bill. The action is barred. *Aliter*, if C. sued A. on the implied contract of indemnity.<sup>1</sup>

3. C. is the indorser of a bill or note payable on demand. Time (presumably) does not begin to run in favor of C. until demand has been made and notice given.

NOTE.—In England it is held that the holder's right of action against the drawer or an indorser is not complete until notice of dishonor is received;<sup>2</sup> when then does the cause of action arise when the notice is delayed or lost in the post? (Cf. Art. 193.) Perhaps from the time when it ought to have been received. In America the balance of authority favors the view that the cause of action is complete when notice of dishonor is sent.<sup>3</sup> In cases where notice of dishonor is unnecessary (Art. 200) probably the cause of action arises on dishonor.

*Explanation 3.*—When an action is brought against a party to a bill, to enforce an obligation collateral to the bill, though arising out of the bill transaction, the nature of the particular transaction determines the period from which time begins to run.

#### ILLUSTRATIONS.

1. B. accepts a bill to accommodate the drawer. It is dishonored, and two years afterwards B. is compelled to pay the holder. B. sues the drawer on the implied agreement to indemnify. Time runs from the date B. was compelled to pay, and not from the maturity of the bill.<sup>4</sup>

2. B. authorizes A., an agent abroad, to draw upon him for the price of goods to be shipped to B. B. dishonors a draft so

<sup>1</sup> *Webster v. Kirk* (1852), 17 Q. B. 944; Cf. *Golfrey v. Rice* (1870), 59 Me. 308; *Bullock v. Campbell* (1850), 9 Gill. (Md.) 182. But cf. *Woodruff v. Moore* (1850), 8 Barb. (N. Y.) 171; *Kennedy v. Carpenter* (1856), 2 Whart. (Pa.) 344.

<sup>2</sup> *Castrique v. Bernabo* (1844), 6 Q. B. 498.

<sup>3</sup> *Shed v. Brett* (1823), 1 Pick. (Mass.) 401; *Manchester Bank v. Fellows* (1854), 8 Fost. (N. H.) 302. *Contra*, *Smith v. Bank* (1819), 5 S. & R. (Pa.) 318.

<sup>4</sup> *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; *Angroes v. Tippet* (1865), 11 L. T. N. S. 708; Cf. *Burton v. Rutherford* (1872), 49 Mo. 72. But cf. *Coppin v. Gray* (1842), 11 L. J. Ch. 105. as to premature payment; see *Davies v. Humphries* (1846), 6 M. & W. 153 (contribution among co-makers).

drawn, and A. is compelled to take it up. A. can sue B. on an implied contract to indemnify. Time runs from the date when A. was compelled to pay.<sup>1</sup> Limitation, how computed against the several parties

3. A., intending to lend C. \$50, draws a check in C.'s favor for that sum. A. sues C. to recover the loan. Time runs from the date when the check was cashed.<sup>2</sup>

NOTE.—See Art. 230, n., distinguishing a right of action on a bill from a right of action which a party to a bill may have arising out of the bill transaction but independent of the instrument.

*Foreign laws and conflict of laws.*—In France the period of limitations is five years, and the time it seems begins to run against acceptor, drawer, and indorsers from the day of protest.<sup>3</sup> By German Exchange Law, Art. 77, the limitation as regards the acceptor is three years, starting from the maturity of the bill; but as regards the drawer or indorsers it is three months, starting from the day of protest, if the drawer or indorser live and the bill be payable in Europe. Where laws conflict as to time of limitation, and the limitation, as in England, merely bars the remedy, the *lex fori* governs.<sup>4</sup> *Aliter*, probably, when lapse of time operates as a discharge. But if a note is barred by the statute in the place of the debtor's domicile, the courts of another state will generally treat it as barred in their state also.<sup>5</sup> Cf. Art. 231.

Art. 253. Any circumstance which postpones or defeats the operation of the statute of limitations in the case of an ordinary contract, postpones or defeats it in like manner in the case of a bill. Statute, how defeated.

#### ILLUSTRATIONS.

1. The holder of an accepted bill dies intestate before its maturity. The statute does not begin to run until an administrator is appointed.<sup>6</sup>

<sup>1</sup> *Huntley v. Sanderson* (1833), 1 Cr. & M. 467; Cf. *King v. Hannah* (1880), 6 Bradw. (Ill.) 495.

<sup>2</sup> *Garden v. Bruce* (1868), 3 L. R. C. P. 300.

<sup>3</sup> French Code, Art. 189; *Nouguier*, § 1605.

<sup>4</sup> *Don v. Lippman* (1837), 5 Cl. & F. 1, H. L.; *Le Roy v. Crowninshield* (1820), 2 Mason (C. Ct.), 151; *Putnam v. Dike* (1859), 13 Gray (Mass.), 535.

<sup>5</sup> *Wernse v. Hall*, (1882), 101 Ill. 423.

<sup>6</sup> *Murray v. East India Co.* (1821), 5 B. & Ald. 204; *Abbott v. McElroy* (1848), 10 Sm. & M. 100; *Wenman v. Mohawk Ins. Co.* (1835), 13 Wend. (N. Y.) 267; see conversely, *Maxwell v. Tushill* (1878), 1 Ir. L. R. Ch. D. 250, and *Conant v. Hitt* (1840), 12 Vt. 285 (death of acceptor intestate).

Statute, how  
defeated.

2. The holder of a bill at the time of its dishonor is a minor or a married woman or a lunatic. The statute does not begin to run against such holder until the disability ceases.<sup>1</sup>

3. Note payable on demand with interest. Four years after its issue the holder sues the maker for interest and recovers. Three years later (*i. e.*, seven years after issue of note) the holder sues the maker on the note. The action is barred.<sup>2</sup> *Aliter*, if the payment of interest had been voluntary.<sup>3</sup>

4. An acknowledgment in writing signed by the party sought to be charged defeats the operation of the statute, *e. g.*, the maker of a note twenty years after its maturity signs his name on the back and adds the date. The holder can sue the maker within six years after this acknowledgment.<sup>4</sup>

NOTE.—A verbal acknowledgment of an existing liability on the bill defeats the operation of the statute at common law. By the statute of 9 Geo. 4, c. 14, s. 3, no indorsement or memorandum of any payment written or made upon a bill by or on behalf of the party to whom such payment is made, is sufficient to defeat the operation of the statute. But the rule is otherwise at common law.<sup>5</sup> When the statute begins to run nothing stops it. It is clear then that if a dishonored bill be indorsed to an infant the time still runs on.<sup>6</sup> On the other hand, if the holder of a bill at the time of dishonor be an infant, and he subsequently indorse it while still an infant to an adult, it is conceived that the statute runs from the indorsement. It seems that an acknowledgment to the holder inures for the benefit of a subsequent holder.<sup>7</sup>

<sup>1</sup> Cf. 21 Jac. 1, c. 16; *Scarpelini v. Atcheson* (1845), 7 Q. B. 864.

<sup>2</sup> *Morgan v. Rowlands* (1872), 7 L. R. Q. B. 493; see, also, *Harding v. Edgecumbe* (1859), 28 L. J. Ex. 313 (payment by agent); *Goodwin v. Buzzell* (1861), 35 Vt. 9.

<sup>3</sup> *Green v. Greensboro College* (1880), 83 N. C. 449.

<sup>4</sup> *Bourdin v. Greenwood* (1872), 13 L. R. Eq. 281. See as to acknowledgments, *Re River Steamer Co.* (1871), 6 L. R. Ch. at 828, Mellish, L. J.; *Chasemore v. Turner* (1875), 10 L. R. Q. B. 500, Ex. Ch.

<sup>5</sup> *Clark v. Burn* (1878), 86 Pa. St. 502.

<sup>6</sup> *Rhodes v. Smethurst* (1840), 6 M. & W. 351, Ex. Ch.; Cf. *Abbott v. McEtroy* (1848), 10 Sm. & M. 100.

<sup>7</sup> *Little v. Blunt* (1830), 9 Pick. (Mass.), 488; *Dean v. Hewitt* (1830), 5 Wend. (N. Y.), 257; Cf. *Cripps v. Davis* (1842), 12 M. & W. 159.

## CHAPTER IX.

### PROVISIONS PECULIAR TO CHECKS.

[EXPLANATORY HEAD-NOTE.—The term "bill" as used in the articles of this treatise, includes checks as well as ordinary bills of exchange; and subject to the provisions of this chapter, the provisions of this work relating to bills of exchange payable on demand apply equally to checks. See *Intro.*, p. x, and head-note to *Chap. I.*]

Art. 254. A check is a bill of exchange<sup>1</sup> drawn check defined. by a customer on his banker<sup>2</sup> payable on demand.<sup>3</sup>

NOTE.—See checks compared with and distinguished from ordinary bills of exchange by Parke, B.,<sup>4</sup> Erle, J., and Byles, J.,<sup>5</sup> Palles, C. B.,<sup>6</sup> and the Supreme Court of the United States.<sup>7</sup> All checks are bills of exchange, but all bills of exchange are not checks; therefore an authority to draw checks does not necessarily include an authority to draw bills (*cf.* Art. 73). Apart from statute the distinctions between checks and ordinary bills of exchange arise from the relationship of banker and customer necessarily subsisting between the drawer and drawee of a check. See further the notes to Arts. 5, 67, 78,

<sup>1</sup> *McLean v. Clydesdale Bank* (1883), 9 App. Cas. 95; *Cf. Eyre v. Walker* (1860), 29 L. J. Ex. 246; *Hopkinson v. Forster* (1874), 19 L. R. Eq. 74; *Harker v. Anderson* (1839), 21 Wend. (N. Y.) 372; *Bickford v. Bank* (1866), 42 Ill. 288.

<sup>2</sup> *Cf. Bowen v. Newell* (1853), 8 N. Y. 190; *Attorney Genl. v. Ins. Co.* (1877), 71 N. Y. 325 at 332; British Code, § 73.

<sup>3</sup> *Id.*; *Forster v. Mackreth*, (1867), 2 L. R. Ex. 163; *Woodruff v. Bank* (1841), 25 Wend. (N. Y.) 673; *Morrison v. Bailey* (1855), 5 O. St. 13; *Cf. Andrew v. Blachly* (1860), 11 O. St. 89; *Minturn v. Fisher* (1854), 4 Cal. 36; *Cutler v. Reynolds* (1872), 64 Ill. 321. But see *In re Brown* (1848), 2 Story (C. Ct.), 502; *Champion v. Gordon* (1872), 70 Pa. St. 475; *Westminster Bank v. Wheaton* (1856), 4 R. I. 30 (payable after date).

<sup>4</sup> *Ramchurn v. Lachmeechund* (1854), 9 Moore P. C. at 69.

<sup>5</sup> *Keene v. Beard* (1860), 8 C. B. N. S. at 380, 381, as modified by *Hopkinson v. Forster*, *supra*, at 76. Jessel, M. R.

<sup>6</sup> *Lynn v. Bell* (1876), 10 Ir. R. C. L. at 490.

<sup>7</sup> *Merchants' Bank v. State Bank* (1870), 10 Wall. (U. S.) at 647; see also, *Morrison v. Bailey* (1855), 5 O. St. 13.

**Check defined.** 105, 160, 162. A check is intended for prompt presentment, while a note payable on demand is deemed to be a continuing security.<sup>1</sup> In France, checks are regulated by the "Loi du 23 Mai, 1865," which defines a check as "L'écrit qui sous la forme d'un mandat de paiement sert au tireur à effectuer le retrait à son profit ou au profit d'un tiers de tout ou partie des fonds portés au crédit de son compte et disponibles."

**Acceptance of check.**

**Art. 256.** A check is not intended for acceptance, but for prompt presentment and payment.<sup>2</sup>

**NOTE.**—At common law there is no objection to the acceptance of a check,<sup>3</sup> but in England the Bank Charter Acts would in most cases render this illegal.

**Certified Checks.**—The practice of certifying checks as "good," either by writing thereon, or verbally,<sup>4</sup> prevails extensively in the United States, and the effect of such certification is to discharge the drawer and to make the bank the primary and principal debtor,<sup>5</sup> and the check may then be kept in circulation.<sup>6</sup> Like the acceptance of a bill, the certification of a check, while it admits the signature of the drawer in favor of a *bona fide* holder, does not estop the bank from setting up a forgery in the body of the check when certified.<sup>7</sup>

**Reasonable time for presentment.**

**Art. 257.** A check is deemed to have been presented within a reasonable time when presented according to the following rules:—

- (1.) If the person who receives the check and the banker on whom it is drawn are in the same

<sup>1</sup> *Brooks v. Mitchell* (1841), 9 M. & W. at 18, Parke, B.; *Chartered Bank v. Dickson* (1871), 3 L. R. P. C. at 579, Id. Cairns; Cf. Art. 285.

<sup>2</sup> Cf. *Ramchurn v. Lachmeechund* (1854), 9 Moore, P. C. at 69, Parke, B.; *Fegley v. McDonald* (1879), 89 Pa. St. 128.

<sup>3</sup> Cf. *Robson v. Bennet* (1810), 2 Taunt. 388; *Pollard v. Bank of England* (1871), 6 L. R. Q. B. 623; *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 351, 352; *Merchants' Bank v. State Bank* (1870), 10 Wall. (U. S.), at 647.

<sup>4</sup> *Espy v. Bank* (1873), 18 Wall. (U. S.), 604; Cf. *Barnet v. Smith* (1855), 10 Fost. (N. H.) 256; *Pope v. Bank* (1871), 59 Barb. (N. Y.) 226.

<sup>5</sup> *First Nat. Bank v. Leach* (1873), 52 N. Y. 350; Cf. *Meads v. Bank* (1862), 25 N. Y. 143; *Mutual Bank v. Roige* (1876), 28 La. An. 933. But see *Brown v. Leckie* (1867), 43 Ill. 497; *Bickford v. Bank* (1866), 42 Ill. 238.

<sup>6</sup> *Nolan v. Bank* (1873), 67 Barb. (N. Y.) 24.

<sup>7</sup> *Security Bank v. Bank* (1876), 67 N. Y. 423; *Marine Bank v. City Bank* (1874), 59 N. Y. 67; *Clews v. Bank of N. Y. Nat. Banking Assoc.* (1882), 89 N. Y. 418 (raised check). *Contra, Louisiana Bank v. Bank* (1876), 28 La. An. 189.

place, the check must, in the absence of special circumstances,<sup>1</sup> be presented for payment on the day after it is received.<sup>2</sup>

Reasonable  
time for pre-  
sentment.

- (2.) If the person who receives a check and the banker on whom it is drawn are in different places, the check must, in the absence of special circumstances,<sup>3</sup> be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present it or forward it on the day after he receives it.<sup>4</sup>

*Explanation.*—In computing time non-business days must be excluded.<sup>5</sup>

#### ILLUSTRATIONS.

1. C., in London, receives a check drawn on a London banker on Monday. On Tuesday, instead of presenting it himself he pays it in to his bankers, who present on Wednesday. C. has not presented the check within a reasonable time.<sup>6</sup>

2. C., on Monday, in London, receives a check drawn on a Jersey bank. On Tuesday C. pays it to a London bank. The London bank on the same day forward it by post direct to the Jersey bank, requesting payment. C. has duly presented the check.<sup>7</sup>

Cf. Arts. 169, 201, excuses for delay, and *Firth v. Brooks* (1861), 4 L. T. N. S. 467.

<sup>2</sup> *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; *Simpson v. Pacific Ins. Co.* (1872), 44 Cal. 139; *Burkhalter v. Bank* (1870), 42 N. Y. 538; *Smith v. Miller* (1870), 43 N. Y. 171; *Cawein v. Brocinski* (1869), 6 Bush. (Ky.) 457; *Andrews v. Bank* (1872), 9 Heisk. (Tenn.) 211.

<sup>3</sup> Cf. Arts. 169, 201, excuses for delay, and *Firth v. Brooks* (1861), 4 L. T. N. S. 467.

<sup>4</sup> *Hare v. Henty* (1861), 30 L. R. C. P. 302; *Prideaux v. Criddle* (1869), 4 L. R. Q. B. 455; Cf. *Griffin v. Kemp* (1874), 46 Ind. at 176; *Veazie Bank v. Winn* (1855), 40 Me. at 61; *Woodruff v. Plant* (1874), 41 Conn. 344.

<sup>5</sup> Cf. Arts. 20, 195, 196; *Jones v. Heiliger* (1874), 36 Wis. at 153; 34 and 35 Vict. c. 17.

<sup>6</sup> *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; Cf. *Furwell v. Curtis* (1876), 7 Biss. (C. Ct.) 160.

<sup>7</sup> *Heywood v. Pickering* (1874), 9 L. R. Q. B. 423.

Reasonable  
time for pre-  
sentment.

NOTE.—The result of the cases seems to be this: A party who receives a check has a clear day for presenting or forwarding it. If, instead of presenting it himself, he forwards it to some one else to present, the question is, was he acting reasonably in so doing? A principal, of course, is responsible to third parties for the act of his agents, *e. g.*, if a person forwards a check to an agent, and the agent instead of presenting it himself unreasonably forwards it to another agent, the loss as regards third parties falls on the principal, though he may have a remedy over against his agent. The question whether a check has been presented within a reasonable time may arise between drawer and holder, or between indorser and indorsee, or between transferor by delivery and transferee,<sup>1</sup> or between customer and banker.<sup>2</sup> In each case it must be determined as between the particular parties. See a different standard of reasonable time as between vendor and vendee where the vendor of goods was paid by the check of the vendee's agent.<sup>3</sup>

Presentment  
and notice to  
charge drawer.

Art. 258. The drawer of a check is not discharged by the holder's omission to present it for payment within a reasonable time as defined by Art. 257, or to give due notice of dishonor, unless the drawer has suffered actual damage through the delay.<sup>4</sup>

#### ILLUSTRATIONS.

1. A. draws a check in favor of C. in 1870. It is presented for payment in 1872, and dishonored. No reason for the delay is shown. A. is not discharged. The holder can sue him.<sup>5</sup>

2. A check drawn by A. on a London bank is handed to the payee in London on Monday. On Wednesday morning the bank on which it is drawn stops payment, A. having at that

<sup>1</sup> See, *e. g.*, *Moule v. Brown* (1838), 4 Bing. N. C. 266.

<sup>2</sup> See, *e. g.*, *Hare v. Henty* (1861), 30 L. J. C. P. 302.

<sup>3</sup> *Hopkins v. Ware* (1869), 4 L. R. Es. 268; Cf. *Smith v. Miller* (1870), 43 N. Y. 171.

<sup>4</sup> As to presentment, *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; *Robinson v. Hawksford* (1846), 9 Q. B. 52; *Laws v. Rand* (1857), 27 L. J. C. P. 76; *Bailey v. Bodenham* (1864), 33 L. J. C. P. 253; *Heywood v. Pickering* (1874), 9 L. R. Q. B. at 432; *Stewart v. Smith* (1866), 17 O. St. 82; *Allen v. Kramer* (1878), 2 Bradw. (Ill.) 205. As to notice—*Shaffer v. Maddox* (1879), 9 Neb. 205; *Clark v. Bank* (1875), 2 MacArthur (D. C.), 249; *Griffin v. Kemp* (1874), 46 Ind. 172. As to burden of proving injury—*Planters' Bank v. Merritt* (1872), 7 Heisk. (Tenn.) 177.

<sup>5</sup> *Laws v. Rand* (1857), 27 L. J. C. P. 76.

time funds there sufficient to meet it. The check is presented on Wednesday afternoon. A. is discharged.<sup>1</sup>

Presentment  
and notice to  
charge drawer.

*Explanation.*—When a check is not presented within a reasonable time of its issue, and the drawer sustains actual damage through the delay, it is (probably) no excuse that such delay was caused by the *bona fide* negotiation of the check through different hands.<sup>2</sup>

NOTE.—In *Laws v. Rand* (1857),<sup>3</sup> it is suggested that the omission to present a check within six years of its issue would in any case discharge the drawer. No case against an indorser has arisen in England. It is well settled in America that an indorser is discharged by the omission to present within a reasonable time, irrespective of actual damage.<sup>4</sup>

Art. 259. It is uncertain when a check not known to have been dishonored is to be deemed overdue for the purpose of affecting the holder with equities of which he had no notice at the time the check was negotiated to him.<sup>5</sup>

when deemed  
overdue.

#### ILLUSTRATIONS.

1. A. is induced by fraud to draw a check in favor of C. Six days after its date C. indorses the check to D. D. has not taken an overdue check; therefore if he gave value and had no notice of the fraud he has a good title.<sup>6</sup>

<sup>1</sup> *Alexander v. Burchfield*, (1842), 7 M. & Gr. 1061; *State v. Gates* (1877), 67 Mo. 139; *Farwell v. Curtis* (1876), 7 Biss. (C. Ct.) 160; Cf. *Kinyon v. Stanton* (1878), 44 Wis. 479; *Figley v. McDonald* (1879), 89 Pa. St. 128 (discharge of surety).

<sup>2</sup> Cf. *Mohawk Bank v. Broderick* (1834), 13 Wend. (N. Y.) 133; *Daniel*, § 1595; see Art. 254, n.; but Cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. 253, where, however, the point was not argued, and the drawer was held to be discharged on another ground.

<sup>3</sup> 27 L. J. C. P. 76; Cf. *Pott v. Clegg* (1847), 16 M. & W. 321, for a reason.

<sup>4</sup> *Smith v. Jones* (1838), 20 Wend. (N. Y.) 192; *Veazie Bank v. Winn* (1855), 40 Me. 60.

<sup>5</sup> *Servel v. Ry. Co.* (1850), 9 C. B. 811 at 828, 829; Cf. *Boehm v. Stirring* (1797), 7 T. R. 423; *Himmelman v. Hotelling* (1870), 40 Cal. 111.

<sup>6</sup> *Rothschild v. Corney* (1829), 9 B. & C. 388 (six days); *London & County Banking Co. v. Groome* (1881), L. R. 8 Q. B. D. 288 (eight days; prior decisions reviewed); Cf. *Ames v. Merriam* (1867), 98 Mass. 294



When deemed  
overdue.

2. May 1, 1880, C., the payee of a check, transfers it to D., who takes for value and without notice that it was given for an illegal consideration. The check was not in fact *issued* until the day of transfer to D., though dated May 1, 1879. D. has not taken an overdue check, and is, therefore, not subject to equities.<sup>1</sup>

3. A *certified* check, payable to bearer, is transferred by E. to F. six months after the time of its date. F. has not taken an overdue check, and has, therefore, a good title, though E. had stolen the check from the owner.<sup>2</sup>

4. A "Mem." check was transferred to D. two years and a half after its date. D. was held to have taken an overdue check.<sup>3</sup>

NOTE.—Cf. Arts. 133, 134, as to overdue bills of exchange, Art. 282, as to overdue note on demand, and see Art. 138.

Banker's duty  
to honor  
checks.

Art. 260. A banker, as such, is bound to honor 'his customers' checks, when duly presented, to the extent of the balance which the customer then has in his hands. If the banker make default he is liable to his customer in an action for damages.<sup>4</sup>

*Explanation 1.*—A banker is entitled to have funds paid in a reasonable time before the customer draws against them, in order that he may be aware of the state of accounts between them when the check is presented.<sup>5</sup>

*Explanation 2.*—As regards banks having several branches, where a customer has an account at one

(ten days): *First Nat. Bank v. Harris* (1871), 108 Mass. 514 (four days); *Lester v. Given* 8 (1871), Bush. (Ky.) 357.

<sup>1</sup> *Cowing v. Altman* (1877), 71 N. Y. 435.

<sup>2</sup> *Nolan v. Bank* (1873), 67 Barb. (N. Y.) 24.

<sup>3</sup> *Skillman v. Titus* (1866), 32 N. J. L. 96; Cf. *Lancaster Bank v. Woodward* (1852), 18 Pa. St. 357 (year); *First Nat. Bank v. Needham* (1870), 29 Ia. 249 (five months).

<sup>4</sup> *Marzetti v. Williams* (1830), 1 B. & Ad. 415; *Whitaker v. Bank* (1835), 1 C. M. & R. 744; *Gray v. Johnston* (1868), 3 L. R. H. L. 1, see at 14 per Ld. Westbury; Cf. *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 51. Ex. Ch.; *Bickford v. First Nat. Bank* (1866), 42 Ill. at 240, 241. As to measure of damages, see Art. 209.

<sup>5</sup> *Whitaker v. Bank*, *supra*, at 749-750, Parke, B.; Cf. *Bransby v. Bank* (1866), 14 L. T. N. S. 403.

branch, the other branches at which he has no 8C- Banker's duty  
count are not bound to honor his checks;<sup>1</sup> but where to honor  
a customer has accounts at two or more branches the checks  
bank is entitled to combine such accounts against  
him.<sup>2</sup>

NOTE.—The combined accounts must be kept in the same right, *e.g.*, a personal and a trust account cannot be combined. See the whole status of branch banks in regard to bills discussed by the Privy Council.<sup>3</sup>

*Duty as to Bills.*—The contract implied by law between banker and customer may of course be modified by special agreement, but apart from this, money in the hands of a banker is in effect money lent, re-payable on demand, which may be either personal or by check.<sup>4</sup> When a customer accepts a bill payable at his bankers, it is an authority to the banker to pay it;<sup>5</sup> but *qu.* if the banker is bound to do so in the absence of special agreement?<sup>6</sup> In the absence of special agreement a banker is clearly under no obligation to accept his customer's bills (Art. 208), nor, it seems, is he bound to pay a bill, other than a check, drawn on him by a customer (Art. 208). In England, a post-dated check known to be such is an ordinary bill of exchange payable after date,<sup>7</sup> but in America it is regarded only as a check issued on day of date.<sup>8</sup> In the absence of special agreement, express or implied, founded on consideration, a banker is, of course, under no obligation to let a customer overdraw.<sup>9</sup>

Art. 261. The authority of a banker to pay a Death or bank  
check drawn on him by a customer is determined by ruptcy of  
drawer.

<sup>1</sup> *Woodland v. Fear* (1857), 7 E. & B. 519.

<sup>2</sup> *Garnet v. M'Kewan* (1872), 8 L. R. Ex. 10.

<sup>3</sup> *Prince v. Oriental Bank* (1878), 3 L. R. Ap. Ca. 325.

<sup>4</sup> Cf. *Pott v. Clegg* (1847), 16 M. & W. 821; *Foley v. Hill* (1948), 2 H. L. Ca. 28; *Attorney Gen'l v. Ins. Co.* (1877), 71 N. Y. at 232; *Knecht v. U. S. Sav. Inst.* (1876), 2 Mo. Ap. 563. See, too, *Re Hallett's Estate* (1880), 13 L. R. Ch. D. at pp. 727, 728 C. A.; *Re Agra Bank* (1866), 86 L. J. Ch. 151 (banker is debtor to, not trustee for, his customer).

<sup>5</sup> *Kymer v. Laurie* (1849), 18 L. J. Q. B. 218.

<sup>6</sup> Cf. *Roberts v. Tucker* (1851), 16 Q. B. at 579.

<sup>7</sup> *Forster v. Mackreth* (1867), 2 L. R. Ex. 163; Cf. *Emmanuel v. Roberts* (1868), 9 B. & S. 121, and Art. 57. But see *Gatty v. Fry* (1877), 2 L. R. Ex. D. 265.

<sup>8</sup> *Taylor v. Sip* (1863), 30 N. J. L. 284; *Mohawk Bank v. Broderick* (1834), 13 Wend. (N. Y.) 133.

<sup>9</sup> *Cumming v. Shand* (1832), 29 L. J. Ex. at 132; Cf. *Lancaster Bank v. Woodward* (1852), 18 Pa. St. 357.

Death or bankruptcy of drawer. notice of the customer's death,<sup>1</sup> or bankruptcy,<sup>2</sup> or customer's countermand of payment.<sup>3</sup>

NOTE.—The banker's duty to pay is determined by the fact of death or bankruptcy, but a payment made in ignorance of the fact is valid. When a firm of two partners has a banking account, and one dies, the authority of the surviving partner to draw checks on the firm account, is not determined.<sup>4</sup>

Gift in contemplation of death.

Art. 262. A check given by the drawer in contemplation of death must be presented for payment by the donee before the drawer's death in order to entitle the donee to receive the amount out of the drawer's estate as a *donatio mortis causa*.

#### ILLUSTRATIONS.

1. A. draws a check in favor of C., and in contemplation of death hands it to him as a gift. After A.'s death it is presented and payment refused. C. cannot claim for the amount against A.'s estate.<sup>5</sup>

2. A. in contemplation of death, draws a check and gives it to C. After A.'s death C. presents the check, and the bankers, in ignorance of A.'s death, pay it. C. can (probably) retain the money as against A.'s representatives.<sup>6</sup>

3. A., in contemplation of death, draws a check and gives it to C. Before A.'s death C. presents it for payment. The bankers refuse to pay it, because doubtful of A.'s signature. A. dies, and payment is subsequently refused on that ground. C., the donee, is entitled to receive the amount out of A.'s estate.<sup>7</sup>

<sup>1</sup> *Rogerson v. Ladbroke* (1822), 1 Bing. N. C. 93; Cf. *Tate v. Hilbert* (1793), 2 Ves. Jr. at 118. But see *Daniel*, § 1618b, criticising this doctrine.

<sup>2</sup> *Vernon v. Hankey* (1787), 2 T. R. 113; *Ex parte Sharp* (1844), 3 M. D. & D. 490.

<sup>3</sup> Cf. *Cohen v. Hale* (1878), 3 L. R. Q. B. D. 371; *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95.

<sup>4</sup> *Backhouse v. Charlton* (1878), L. R. 8 Ch. D. 444; see, too, *Usher v. Dauncey* (1814), 4 Camp. 97.

<sup>5</sup> *Hewitt v. Kaye* (1868), 6 L. R. Eq. 198; *Beak v. Bank* (1872), 13 L. R. Eq. 489; Cf. *Jones v. Lock* (1865), 1 L. R. Ch. 25; *Harris v. Clark* (1849), 3 N. Y. 93; *Second Nat. Bank v. Williams* (1865), 13 Mich. at 291.

<sup>6</sup> Cf. *Tate v. Hilbert* (1793), 2 Ves. jr. at 118; *Burke v. Bishop* (1875), 27 La. An. 465. The bankers are justified in paying, see Art. 261.

<sup>7</sup> *Bromley v. Brunton* (1868), 6 L. R. Eq. 275.

4. A., in contemplation of death, draws a check and gives it to C. Before A.'s death C. negotiates the check for value. <sup>Gift in contemplation of death.</sup> The holder can claim for the amount against A.'s estate.<sup>1</sup>

NOTE.—Cf. Art. 105. The position of the donee of a check is this: he cannot enforce payment against the drawer's estate because he is not a holder for value (Art. 91), and the banker's authority to pay is revoked by notice of the drawer's death (Art. 261). A check given for value, it is conceived, is on the same footing as an ordinary bill of exchange. But, assuming that as between drawer and payee, it is a mere authority to receive the amount, still an authority coupled with an interest is not revoked by death.<sup>2</sup>

Art. 264. A check, on payment, becomes the property of the drawer,<sup>3</sup> but the banker who pays it is entitled to keep it as a voucher until his account with his customer is settled.<sup>4</sup> <sup>Property in paid check.</sup>

NOTE.—Arts. 265–270 of the English work (omitted) embody the statutory provisions in England as to crossed checks.<sup>5</sup> As to the origin of this practice of crossing checks, and the effect of so doing before the statute, see *Bellamy v. Majoribanks* (1857), 7 Ex. 402, Parke, B. The practice has not been adopted in America.

<sup>1</sup> *Rolls v. Pearce* (1877), 5 L. R. Ch. D. 730.

<sup>2</sup> Cf. *Hatch v. Searles* (1854); 2 Sm. & G. at 151 and 155; see *passim*, *Snaith v. Mingay* (1813), 1 M. & S. at 95.

<sup>3</sup> *Reg v. Watts* (1850), 2 Den. C. C. 15.

<sup>4</sup> Cf. *Charles v. Blackwell* (1877), 2 L. R. C. P. D. at 162; *In re Brown* (1843), 2 Story (C. Ct.), at 519.

<sup>5</sup> British Code, §§ 76–82; Crossed Checks Act, 1876, 39 & 40 Vict. c. 81.

## CHAPTER X.

### PROVISIONS PECULIAR TO PROMISSORY NOTES.

[EXPLANATORY HEAD-NOTE.—The term “bill” in contradiction to “bill of exchange,” as used in the articles of this treatise, includes, *mutatis mutandis*, promissory note as well as bill of exchange, the maker of a promissory note corresponding with the acceptor of a bill of exchange. See Introd. p. x, and head-note to Chapter I. In this chapter are collected the provisions which apply exclusively to promissory notes.]

Note defined.

Art. 271. A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated, or his order.<sup>1</sup>

NOTE.—See a promissory note compared with a bill of exchange by Lord Mansfield,<sup>2</sup> and Parke, B.,<sup>3</sup> and cf. Art. 286 n. See also some points of difference between a bank note and an ordinary note referred to by Bramwell, B.<sup>4</sup>

*Foreign Law.*—The French law as to notes (billets à ordre), is contained in French Code de Commerce, Arts. 187, 188. Although the Code is silent on the point, it seems that notes payable to bearer (billets au porteur), are to some extent recognized, see *Nouguiet*, §§ 1565–1578. German Exchange Law, Arts. 96–100, deals with notes.

### *Form and Interpretation.*

Necessary parties.

Art. 272. There must be two parties to a promiss-

<sup>1</sup> *Coleham v. Cooke* (1742), Willes, 393 at 396, 397; Cf. *Ferris v. Bond* (1821), 4 B. & Ald. 679.

<sup>2</sup> *Heylyn v. Adamson* (1758), 2 Burr. at 676.

<sup>3</sup> *Gibb v. Mather* (1832), 2 Cr. & J. at 262–263, Ex. Ch.

<sup>4</sup> *Litchfield Union v. Greene* (1857), 1 H. & N. at 839.

sory note in its origin, and they must be different persons, namely:—

Necessary parties.

(1.) The person who makes the promise, called the maker.

(2.) The person in whose favor the promise is made, called the payee. Cf. Art. 2.

*Explanation.*—A writing in the form of a note payable to maker's order is not a note, but by indorsement it becomes one.<sup>1</sup>

#### ILLUSTRATIONS.

1. B. makes a note payable to his own order, and indorses it in blank. This is a valid note payable to bearer.<sup>2</sup>

2. B. makes a note payable to his own order, and indorses it to C. This is a valid note payable to C. or order.<sup>3</sup>

3. B., C. and X. make a joint and several note payable to C. and X. or order. This is a valid note. C. and X. may sue B. on his several liability.<sup>4</sup>

4. B. & Co. make a note payable to C. & Co. or order. X. is a partner in both firms. C. & Co. cannot sue B. & Co. on this note. But if C. & Co. indorse the note, the indorsee may sue

Art. 273. A promissory note is inchoate and incomplete until delivery thereof be made to the payee.<sup>5</sup>

Delivery necessary.

Art. 274. A promissory note may be in any form of words which comply with the requisitions of Art. 273.<sup>6</sup>

Note may be in any form of words.

<sup>1</sup> *Hooper v. Williams* (1848), 2 Exch. 13; *Miller v. Weeks* (1853), 22 Pa. St. 89; Cf. *Smalley v. Wight* (1857), 44 Me. 442; *Lea v. Bank* (1838), 8 Port. (Ala.) at 124.

<sup>2</sup> *Id. Masters v. Baretto* (1849), 8 C. B. 433.

<sup>3</sup> *Gay v. Lander* (1848), 17 L. J. C. P. 286; *Hall v. Burton* (1862), 29 Ill. 321.

<sup>4</sup> *Beecham v. Smith* (1858), E. B. & E. 442. *Aliter*, if a joint note, until indorsed, *Pitcher v. Barrows* (1835), 17 Pick. (Mass.), 361.

<sup>5</sup> *Murdock v. Caruthers* (1852), 21 Ala. 785; *Heywood v. Wingate* (1843), 14 N. H. 73; Cf. *Neale v. Turton* (1827), 4 Bing. 149; *Hapgood v. Watson* (1875), 65 Me. 510; *Walker v. Wait* (1878), 50 Vt. 668.

<sup>6</sup> *Chapman v. Cottrell* (1865), 3 H. & C. 857; Cf. Arts. 53-56, as to delivery.

Note may be  
in any form of  
words.

271,<sup>1</sup> and from which the intention to make a note appears.<sup>1</sup>

#### ILLUSTRATIONS.

1. "Due C. \$100, value received;" "I. O. U. \$100;"<sup>2</sup> "I acknowledge the within note to be just and due," written on the back of a note.<sup>4</sup> These are not notes, but are mere evidence of indebtedness.

2. "I owe you \$100 to be paid May 5th;"<sup>3</sup> "Due C. or order \$100 on demand."<sup>6</sup> These are notes since they import a promise to pay.

3. A certificate of deposit is a note, if it contains a promise to pay, *e. g.*, "C. has deposited in the X. bank \$100, payable to himself on return of this certificate."<sup>7</sup>

4. The following is not a note: "Borrowed of C. \$100 to account for on behalf of the X. Club at — months' notice, if required." (Signed) T. B.<sup>8</sup>

5. A banker's deposit note running: "Received of Mr. C. 150*l.* to be accounted for on demand," and signed, will not be treated as a promissory note.<sup>9</sup>

<sup>1</sup> *Hooper v. Williams* (1848), 2 Exch. at 26; *Almy v. Winslow* (1879), 126 Mass. 342; *Daggett v. Daggett* (1878), 124 Mass. 149; *Woodward v. Genet* (1858), 2 Hilt. (N. Y.) 526.

<sup>2</sup> *Sibree v. Tripp* (1846), 15 M. & W. at 29; Cf. *Jackson v. Slipper* (1869), 19 L. T. N. S. 640.

<sup>3</sup> *Currier v. Lockwood* (1873), 40 Conn. 349 (reviewing cases); *Erans v. Philpotts* (1840), 9 C. & P. 270. *Contra*, *Russell v. Whipple* (1824), 2 Cow. (N. Y.) 536; *Luqueer v. Prosser* (1841), 1 Hill (N. Y.) 256; *Brady v. Chandler* (1860), 31 Mo. 28; *Bacon v. Bicknell* (1863), 17 Wis. 523; *Jacquiu v. Warren* (1866), 40 Ill. 459, but Cf. *Bowles v. Lambert* (1870), 54 Ill. 237.

<sup>4</sup> *Gray v. Bowden* (1839), 23 Pick. (Mass.) 282; Cf. *Daggett v. Daggett*, *supra*.

<sup>5</sup> *Wailhman v. Elsee* (1843), 1 C. & K. 35; Cf. *Brooks v. Elkins* (1836), 2 M. & W. 74.

<sup>6</sup> *Carver v. Hayes* (1859), 47 Me. 257; *Kimball v. Huntington* (1833), 10 Wend. (N. Y.) 675; Cf. *Smith v. Allen* (1812), 5 Day (Conn.) 337; *Hussey v. Winslow* (1874), 59 Me. 170 (*good to bearer*). *Contra*, *Brown v. Gilman* (1816), 13 Mass. 158.

<sup>7</sup> *Klauber v. Eggerstaff* (1879), 47 Wis. 551; *Cate v. Patterson* (1872), 25 Mich. 191; *Hunt v. Divine* (1865), 37 Ill. 137; *Pardoe v. Fish* (1875), 60 N. Y. 265; *Drake v. Markle* (1863), 21 Ind. 433; (f. *Brummagin v. Tallant* (1866), 29 Cal. 503; *Hart v. Life Assn.* (1875), 54 Ala. 495. *Contra*, *Patterson v. Poindexter* (1843), 6 W. & S. 227; Cf. *Sibree v. Tripp*, *supra*.

<sup>8</sup> *White v. North* (1849), 3 Exch. 689.

<sup>9</sup> *Hopkins v. Abbott* (1875), L. R. 19 Eq. 222.

NOTE.—For further illustrations, see Arts. 2, 8, 9, 10, 12, 13, 14, 19, 20, 23, 58. The promise of the maker in a note corresponds with the order to the drawee in a bill of exchange accepted generally. It may be regarded as the same contract stated conversely, and the same considerations apply to both, see Art. 10. An instrument invalid as a negotiable promissory note may of course be effectual as an agreement,<sup>1</sup> or an I. O. U. Subjoined is an ordinary form of note.

\$100.

1, Clark Street, Chicago,  
January 1, 1870.

On demand, I promise to pay to James Charles, or order, one hundred dollars, for value received.

JOHN BROWN.

Art. 275. There may be two or more makers to a promissory note, and they may be liable thereon jointly, or jointly and severally, according to its tenor.<sup>2</sup>

Joint and several note.

## ILLUSTRATIONS.

1. A note in the form "I promise," signed by several persons who are not partners, is their joint and several note.<sup>3</sup>

2. A note in the form "We promise," signed by several persons, is their joint note only.<sup>4</sup>

3. B, X, and Y are partners. B makes a note in the form "I promise," signing "for X. and Y.," T. B. This is the joint note of the firm, and not a several note by B.<sup>5</sup>

*Explanation 1.*—A partner, as such, cannot bind his copartners severally, but by a joint and several note he may bind the firm jointly<sup>6</sup> and himself severally.<sup>7</sup>

<sup>1</sup> Cf. *White v. North* (1849), 3 Ex. Ch. 689.

<sup>2</sup> Cf. *Ex parte Honey* (1871), 7 L. R. Ch. 178.

<sup>3</sup> *Monson v. Drakeley* (1873), 40 Conn. 5 2; *Wallace v. Jewell* (1871), 21 O. St. 163; *Hemmenway v. Stone* (1810), 7 Mass. 58; *Coonley v. Wood* (188'), 36 Hun (N. Y.), 559; *Maiden v. Webster* (1868), 30 Ind. 317; Cf. *Ridd v. Moggridge* (1857), 2 H. & N. 568; dub. Pollock, C. B.

<sup>4</sup> *Barnett v. Juday* (1871), 38 Ind. 86; *Byles*, p. 7; *Parsons*, v. 1, p. 247.

<sup>5</sup> *Ex parte Buckley* (1845), 14 M. & W. 469.

<sup>6</sup> *MacLae v. Sutherland* (1854), 3 E. & B. 1.

<sup>7</sup> *Penkivil v. Connell* (1850), 5 Exch. 381.



Joint and several note.

*Explanation 2.*—A new maker cannot be added to a joint and several note after it has been issued.<sup>1</sup>

NOTE.—See further, Arts. 234 and 245. A bill of exchange differs from a note in this: If there be two or more acceptors they can only be liable jointly, not jointly and severally.<sup>2</sup>

Note containing pledge of security.

Art. 276. A promissory note may contain a pledge of collateral security with authority to sell or dispose thereof.<sup>3</sup>

NOTE.—The right to the security passes with the instrument, and the person who holds the note free from equities, holds the security in like manner.<sup>4</sup> In France the security follows the instrument, *Nouguier*, § 715. The Belgian Commercial Code, § 26, expressly enacts the same as to bills.

Note in alternative.

Art. 277. A promissory note may give the *holder* the option between the payment of the sum specified and the performance of another act by the maker. As to the latter, it is not a note.<sup>5</sup>

#### ILLUSTRATION.

"I promise to pay C. \$100 at my store May 1, 1880 (or in goods on demand), value received." This is a valid note.<sup>6</sup>

NOTE.—As the payee can demand money, and no option is given to the debtor, it is said there is no uncertainty in the instrument. The promise to pay money is absolute. The question has not been raised in England. See Art. 10.

Note under seal.

Art. 278. A promissory note cannot be issued under seal.<sup>7</sup>

<sup>1</sup> *Gardner v. Walsh* (1855), 5 E. & B. 83; see Art. 247.

<sup>2</sup> *Jackson v. Hudson* (1810), 2 Camp. 447.

<sup>3</sup> *Wise v. Charlton* (1836), 4 A. & E. 786; *Towne v. Rice* (1877), 122 Mass. 67; *Knipper v. Chase* (1858), 7 Ia. 145; Cf. *Perry v. Bigelow* (1880), 128 Mass. 129.

<sup>4</sup> *Duncan v. Louisville* (1877), 13 Bush (Ky.) 378; *Kelley v. Whitney* (1878), 45 Wis. 110; *Holmes v. McGinty* (1870), 44 Miss. 94. *Contra* (subject to equities), *Chicago Ry. Co. v. Lowenthal* (1879), 93 Ill. 433; *Johnson v. Carpenter* (1862), 7 Minn. 176.

<sup>5</sup> *Dinsmore v. Duncan* (1874), 57 N. Y. 573; Cf. *Vermilye v. Adams Ex. Co.* (1874), 21 Wall. (U. S.) at 144; N. Y. Civil Code (draft of 1888), § 2729.

<sup>6</sup> *Hosstatter v. Wilson* (1862), 36 Barb. (N. Y.) 307; Cf. *Hodges v. Shuler* (1860), 22 N. Y. 114; Art. 10, Expl. 3.

<sup>7</sup> *Merritt v. Cole* (1876), 9 Hun (N. Y.), 98; *Lewis v. Wilson* (1840),

NOTE.—If sealed, though made by a corporation, the instrument becomes a specialty,<sup>1</sup> and as such it may be negotiable if issued by the government.<sup>2</sup> In the absence of statute it is not negotiable as a note. It has, however, been held that the negotiability of a note is not destroyed by the indorsement of a corporation through its seal.<sup>3</sup> Before the British Code, which expressly permits the corporate seal to be affixed § 91 (2), it was doubtful whether, by the English law, a bill or note issued by a corporation under its seal, constituted a negotiable instrument.<sup>4</sup> It was held that such an instrument may be negotiable for the purpose of passing with a good title to a *bona fide* purchaser for value.<sup>5</sup> Whether it was to be regarded as a note for all purposes is not clear. It was held that if signed by the directors of a company in a manner binding the directors personally, the addition of the company's seal did not make it binding on the company.<sup>6</sup>

### *Transfer.*

Art. 281. Promissory notes are by statute negotiable “in the same manner as inland bills of exchange are or may be by the custom of merchants.”<sup>1</sup> Statutory negotiability.

NOTE.—This statute, it seems, is merely declaratory;<sup>2</sup> therefore the provisions of Chapter III apply in their entirety to notes. It has been substantially re-enacted in the American States, though the negotiability of notes independent of this statute, has been maintained by many courts. \*

Art. 282. A promissory note payable on demand, and not known to have been dishonored, is to be Note on demand, when overdue.

5 Blackf. (Ind.) 370; *Hopkins v. R. R. Co.* (1842), 3 W. & S. (Pa.) 410, *Rawson v. Davidson* (1883), 49 Mich. 607; Cf. *Lyman v. Califer* (1870), 64 N. C. 572. But Cf. *Banks v. R. R. Co.* (1873), 5 S. C. 156; *Bank v. Smith* (1831), 5 O. 222.

<sup>1</sup> *Steele v. Oswego Co.* (1836), 15 Wend. (N. Y.) 265. See Art. 50, n.

<sup>2</sup> *White v. R. R. Co.* (1858), 21 How. (U. S.) 575; *Goodwin v. Roberts* (1875), 10 L. R. Ex. 337; Cf. *Dinsmore v. Duncan* (1874), 57 N. Y. 573.

<sup>3</sup> *Rand v. Dovey* (1877), 83 Pa. St. 280.

<sup>4</sup> *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 382, 383.

<sup>5</sup> *Ex parte Colborne* (1870), 11 L. R. Eq. 478; *Rumball v. Bank* (1877), 2 L. R. Q. B. D. 194.

<sup>6</sup> *Dutton v. Marsh* (1871), 6 L. R. Q. B. 361.

<sup>7</sup> 3 & 4 Anne, c. 9, § 1.

<sup>8</sup> *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 350.

Note on demand, when overdue.

deemed overdue after the lapse of a reasonable time from its issue.<sup>1</sup> Cf. Art. 285.

*Explanation.*—Reasonable time is a question of law.<sup>2</sup>

NOTE.—What is a reasonable time depends entirely on the circumstances of the case, and the intention and understanding of the parties. Hence one case is no precedent for another. Five months was held a reasonable time in one case,<sup>3</sup> while two and a half months was declared unreasonable in another.<sup>4</sup> This uncertainty has been remedied in several States by statutes fixing the period within which the note shall not be deemed overdue. In some cases, the fact that the note was payable with interest was regarded as material in determining the question.<sup>5</sup> But in England the courts consider a note payable on demand with or without interest as a continuing security, immediate payment not being contemplated by the parties; and it was accordingly held that a note indorsed fourteen years after its date was not indorsed overdue, and was taken by the indorsee free from equities between the maker and payee;<sup>6</sup> and the same rule was laid down by the New York courts, and recently re-affirmed.<sup>7</sup> See further Arts. 133, 134, 138, 259.

Presentment of note on demand.

Art. 285. A promissory note payable on demand must be presented for payment within a reasonable time in order to charge the indorsers.<sup>8</sup>

<sup>1</sup> *Ranger v. Cary* (1840), 1 Met. (Mass.) 369; *Poorman v. Mills* (1870), 39 Cal. 345; *Carll v. Brown* (1852), 2 Mich. 401.

<sup>2</sup> *Poorman v. Mills*, *supra*; *Carlton v. Bailey* (1853), 7 Fost. (N.H.) 230; *Parker v. Tuttle* (1858), 44 Me. 459. *Contra* (fact), *Tomlinson v. Kinsella* (1863), 31 Conn. 268; Cf. *Barbour v. Fullerton* (1859), 36 Pa. St. 105.

<sup>3</sup> *Sanford v. Mickles* (1809), 4 Johns. (N.Y.) 224; Cf. *Deeman v. Haskell* (1858), 45 Me. 430.

<sup>4</sup> *Losee v. Dunkin* (1810), 7 Johns. (N.Y.) 70; Cf. *Herrick v. Wolcorton* (1870), 41 N.Y. 581; *Nerins v. Townsend* (1825), 6 Conn. 5; *Morey v. Wakefield* (1868), 41 Vt. 24.

<sup>5</sup> *Wethey v. Andrews* (1842), 3 Hill (N.Y.), 582; Cf. *Tomlinson v. Kinsella* (1863), 31 Conn. 268.

<sup>6</sup> *Brooks v. Mitchell* (1841), 9 M. & W. 15; Cf. *Cripps v. Davis* (1843), 12 M. & W. at 165, Parke, B. See *Tomlinson v. Kinsella*, *supra*, approving this case.

<sup>7</sup> *Parker v. Stroud* (1885), 98 N.Y. 379, following *Merritt v. Todd* (1861), 23 N.Y. 28.

<sup>8</sup> *Sice v. Cunningham* (1823), 1 Cow. (N.Y.) 397; *Crim v. Starkweather* (1882), 88 N.Y. 339 (payable "on demand after date" with interest "after maturity"); *Keyes v. Fenstermaker* (1864), 24 Cal. 329; *Seaver v. Lincoln* (1838), 21 Pick. (Mass.) 267; *Chartered Bank v. Dickson* (1871), 3 L.R. P.C. 574 at 579. But cf. *Merritt v. Todd* (1861), 23 N.Y. 28, approved *Pardee v. Fish* (1875), 60 N.Y. 265 at 270, 271; and followed, *Parker v. Stroud*, *supra*.

*Explanation.*—Reasonable time is a question of law.<sup>1</sup> In determining what is reasonable time regard must be had to the nature of the instrument as a continuing security.<sup>2</sup>

[ILLUSTRATION.

A note payable on demand is indorsed by C. to D. Ten months afterwards it is presented for payment and dishonored. This may be a reasonable time.<sup>3</sup>

NOTE.—As to presentment to charge indorser see Arts. 160 *et seq.*; to charge maker, Art. 172; to charge guarantor, Art. 173.

*Liabilities of Maker.*

Art. 286. The maker of a promissory note is the principal debtor on the instrument.<sup>4</sup> He engages that he will pay it at maturity according to its tenor.

NOTE.—The maker is sometimes incorrectly called the drawer, but the primary and absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange.<sup>5</sup> In general the maker of a note corresponds with the acceptor of a bill of exchange, and the same rules apply to both. A note indorsed by the payee resembles an accepted bill payable to drawer's order and indorsed by the drawer, the payee corresponding with the drawer.<sup>6</sup> The distinctions that exist between maker and acceptor arise from this: the acceptor is not the creator of a bill; his contract is supplementary, while the maker of a note originates the instrument. Hence (a) a note cannot be made conditionally,<sup>7</sup> while a bill may be accepted conditionally (Art. 39); (b) maker and payee are imme-

<sup>1</sup> *Sics v. Cunningham* (1823), 1 Cow. (N. Y.) 397; Cf. *Alexander v. Parsons* (1870), 3 Lans. (N. Y.) 333. But cf. *Chartered Bank v. Dickson* (1871), 3 L. R. P. C. 574, at 584; *Wyman v. Adams* (1853), 12 Cush. (Mass.) 210; Arts. 150, 195, 282.

<sup>2</sup> *Chartered Bank v. Dickson*, *supra*, at 579-580; Cf. *Serrell v. Ry. Co.* (1850), 9 C. B. at 289; *Lockwood v. Crawford* (1847), 18 Conn. 361; *Rhodes v. Seymour* (1869), 36 Conn. at 6.

<sup>3</sup> *Id.*

<sup>4</sup> Cf. *Id.* at 580, and Art. 272.

<sup>5</sup> *Storu, Notes*, § 4; *Guinnell v. Herbert* (1836), 6 Nev. and Man. 723.

<sup>6</sup> *Id.*; *Heylyn v. Adamson* (1758), 2 Burr, at 678, *Ld. Mansfield*.

<sup>7</sup> Arts. 271 and 10.

Maker's contract.

diates parties in direct relation with each other, while acceptor and payee, except in the case of a bill payable to drawer's order, are remote parties.<sup>1</sup> See, also, the notes to Arts. 10, 20, 37.

Maker's estoppel.

Art. 287. The maker of a note payable to order by the fact of making it conclusively admits and warrants to a *bona fide* holder the existence of the payee and his *then* capacity to indorse.<sup>2</sup>

NOTE.—It was held in a Massachusetts case that the maker was not estopped from setting up the *insanity* of the payee at the time of the execution of the note.<sup>3</sup>

<sup>1</sup> Cf. *Bishop v. Young* (1800), 2 B. & P. at 83, Ld. Eldon.

<sup>2</sup> *Drayton v. Dale* (1823), 2 B. & C. 293; *Lane v. Krekle* (1867), 22 Ia. 399; *Nightingale v. Withington* (1818), 15 Mass. 272; *Burke v. Allen* (1854), 9 Fost. (N. H.) 106; *Esley v. People* (1880), 23 Kans. 510; Cf. Arts. 139, 212, 216.

<sup>3</sup> *Peaslee v. Robbins* (1841), 3 Met. (Mass.) 164.

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